2006

SFR, Inc., a Colorado corporation d/b/a QED v. Atlas Electric, Inc.; Comtrol, Inc.; United States Fidelity & Guaranty Company; and Azam Soofi, an individual : Brief of Appellant

Utah Court of Appeals

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Cass C. Butler; Michael D. Stanger; Callister Nebeker & McCullough; Attorneys for Appellants/ Cross-Appellees.

IN THE UTAH COURT OF APPEALS

SFR, INC., a Colorado corporation d/b/a QED, Appellee and Cross-Appellant, vs. ATLAS ELECTRIC, INC.; COMTROL, INC.; UNITED STATES FIDELITY & GUARANTY COMPANY; and AZAM SOOFI, an individual, Appellants and Cross-Appellee.	Case No. 20060915-CA District Court No. 020902795 Priority No. ____

APPELLANTS' BRIEF

On Appeal from the Final Order of
the Third District Court
Honorable Joseph C. Fratto, Jr.

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ORAL ARGUMENT AND PUBLISHED OPINION REQUESTED

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PARTIES TO THE PROCEEDINGS BELOW

The caption of the case contains the names of all the parties to the proceeding from which review is sought as required by Rule 24 of the Utah Rules of Appellate Procedure.

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STATEMENT REGARDING JURISDICTION

The Court of Appeals has jurisdiction in this matter pursuant to UTAH CODE ANN. § 78-2-2(3)(j) and UTAH CODE ANN. § 78-2a-3(2)(j).

STATEMENT OF ISSUES PRESENTED ON APPEAL

Issue 1: Did the Trial Court err in failing to dismiss Appellee's Complaint as a discovery sanction, after holding that Appellee withheld material damage documents until days before trial, which documents were critical to Appellants' defenses? (Issue preserved in the record at R-2224, pgs. 4, 50, when the Trial Court denied Appellants' "Motion for Sanctions" (R-627-29).

Standard of Review: Abuse of discretion. Coxey v. Fraternal Order of Eagles, Aerie 2742, 112 P. 3d. 1244, 1246 (Utah Ct. App. 2005).

Issue 2: Did the Trial Court err in awarding Appellee pre- and post-judgment interest at 18%, and compounding such rate, where no contractual interest rate existed between Appellee and Appellants?

Standard of Review: No deference is given to a trial court's legal conclusions which are reviewed for correctness. See, Wilcox v. CSX Corp., 70 P.3d 85, 89 (Utah 2003); Springville Citizens for a Better Cmty. v. City of Springville, 979 P.2d 332, 336 (Utah 1999). (Issue preserved in record at the Trial Court's Minute Entry of R-2071-73 (granting 18% compound interest), which Appellants opposed in, *inter alia*, their Response to Appellee's Motion for Reconsideration or Clarification of Ruling on Rule 59(e) and Rule 60(a) Motion to Amend Judgment and Revised Findings of Fact and Conclusions of Law, R-1969-74).

LIST OF STATUTES DETERMINATIVE OF THE APPEAL

UTAH CODE ANN. § 63-56-504(4),

UTAH CODE ANN. § 15-1-1 and § 15-1-4.

STATEMENT OF CASE

This appeal is from the Trial Court's refusal to sanction Appellee by dismissing its Complaint for withholding material damage documents from Appellants until the eve of a four-day bench trial conducted December 19-22, 2005. Appellee SFR, Inc. dba QED (hereinafter "QED") is an electrical supply company which brought suit against Appellants Comtrol, Inc. ("Comtrol"), the general contractor; United States Fidelity & Guaranty Company ("USF&G"), the bonding company; and Atlas Electric, Inc. ("Atlas"), an electrical subcontractor which has since gone out of business. The case involved QED's claim against a payment bond for materials it alleged were unpaid.

Because Comtrol had paid Atlas more than the full amount of its subcontract, Appellants had several important affirmative defenses which they were entitled to develop and present at trial, including: (1) that QED had, in fact, been paid in full by Atlas; (2) that QED had not correctly applied those payments it had received from Atlas; (3) that payments from Atlas had rendered conditional lien releases executed by QED effective; and (4) that materials which for which QED was seeking to recover payment had been delivered prior to the effective date of lien releases, such that the claims for payment were barred. Appellants sought documents necessary to these defenses, including copies of all checks related to the project, an accounting, and ship tickets showing delivery of the goods, via letters and written

discovery requests. QED failed to produce such documents, representing instead that it had produced all relevant documents.

On the eve of trial, QED produced material damage documents relevant to Appellants defenses ("the 11th Hour Documents"), including copies of certain checks paid to it by Atlas, instructions from Atlas as to how the checks should be allocated, QED spreadsheets indicating how the checks had been allocated, and ship tickets. The production of these documents revealed for the first time that the representation of QED's former counsel–that all such documents had been produced–was untrue. Furthermore, these 11th Hour documents, when scrutinized, revealed that there were still additional material damage documents that had not been produced ("the Withheld Documents").[1] Appellants moved to dismiss the case on the ground that failure to produce these material documents deprived Appellants of the fundamental right to defend against QED's claims. The Trial Court denied the motion to dismiss, but excluded the 11th Hour Documents from evidence, and allowed trial to proceed.

On June 13, 2006, the Trial Court entered Judgment for QED and against Appellants, which included attorney's fees and prejudgment interest at 18% (R-1761-63). On June 23, 2006, QED filed Rule 59(e) and Rule 60(a) motions which the Trial Court subsequently addressed by Minute Entry dated August 31, 2006 (R-2074). On October 2, 2006, the Trial

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[1]The Withheld Documents consist of at least four distinct subsets of documents: (1) three checks paid to QED on or about July 12, 2000; August 14, 2000; and September 15, 2000 (Fact 25); (2) Atlas' instructions as to how these three checks should be allocated (Fact 25); (3) QED's spreadsheets showing how these three checks were, in fact, allocated (Fact 25); and (4) a full set of ship tickets, corresponding to each of the 58 invoices QED alleged were unpaid. (Fact 34)

Court entered Amended Findings of Fact and Conclusions of Law as well as an Amended Judgment (R-2124-2144). In addition to $103,052.06 in principal, the Amended Judgment awarded QED prejudgment interest at 18% (totaling $81,109.03) attorneys' fees of at least $120,556.66 and costs in the amount of $2,694.99. (R-2139). Postjudgment interest was to accrue on the Judgment at a rate of 18% on both the principal and prejudgment interest portions of the Judgment. (R-2139). Appellants filed their Notice of Appeal on October 6, 2006 (R-2148-51). QED filed a Notice of Cross Appeal on October 19, 2006. (R-2171-72).

FACTS RELEVANT TO ISSUES ON APPEAL

1. On March 8, 2000, Granite School District awarded Comtrol a contract to act as the general contractor for the construction of the Matheson Junior High School located in Magna, Utah (the "Matheson Project"). (R- Plt. Ex. 2[2]).

2. As is required by Utah law (UTAH CODE ANN. §63-56-504(1)(b)), Comtrol obtained a payment Bond from USF&G "for the protection of each person supplying labor, service, equipment or material" to the Project. The Bond required bond claimants to submit a written claim stating, "with substantial accuracy, the amount of the claim" (R- Plt. Ex. 1, pg. 13).

3. Comtrol then subcontracted with Atlas for the electrical portion of the Matheson Project. (R-Plt. Ex. 3). Comtrol's subcontract with Atlas, for both labor and materials, originally totaled $1,322,996.00; that amount was later reduced by change orders

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[2]Consistent with UTAH R. APP. P. 24(e), reference to the trial exhibits will be made by "P. Ex. __" or "D. Ex. __".

and backcharges to $1,121,283.79. (R-Def. Ex. 21; R-2222, p. 629). Atlas purchased the electrical components from QED who was Atlas' "major product supplier" on the project (R-2221, pg. 420), supplying 95% of all of the electrical components (R-2221, pgs. 431-432).

4. On April 6, 2000, QED gave Comtrol a statutory preliminary notice stating that its bid with Atlas for the project's materials was for $650,000, or roughly ½ of the total amount of Atlas' contract with Comtrol (R-P. Ex. 1).

Other Atlas Projects with QED

5. During the Matheson Project, Atlas was also purchasing electrical materials from QED for other unrelated projects: the Nellis Air Force Base project, the Connor Road project, the Chapel Glen project, and the Corinthian project. (R-2220, pgs. 120-122).

6. Most of QED's customers, like Atlas had "four, five, or ten projects going on all at the same time" and would pay QED via lump sum checks indicating that the customer "would like part of the money [to be allocated] for one project and part of the money for another project." QED's policy was to honor a customer's payment allocation instructions. (R-2220, pg. 121).

Atlas' Departure from the Matheson Project

7. Atlas nearly completed the electrical work on the Matheson Project and was paid $1,135,414.40 by Comtrol, either directly or jointly with QED or other suppliers (R-D. Ex. 20A). This was over $14,000 more than Atlas' revised subcontract amount. However, before completing the remaining work, Atlas left the job in February of 2002 and subsequently went out of business (R-2222, pgs. 460 and 592). As a replacement, Comtrol

hired another electrical contractor, All Phase Electric, to finish the Matheson Project (R-2222, pg. 593). At the time of the Complaint, the locations of Atlas and its owner, Defendant Azam Soofi, were unknown (R-12-17). QED subsequently found Mr. Soofi in Phoenix, Arizona, and obtained a Default Judgment against Atlas for $166,869.50 (R-98).

8. While Comtrol paid Atlas the entire amount of its subcontract of $1.1 Million[3], QED claimed that it was not completely paid in turn by Atlas for the materials portion. Consequently, on February 6, 2002, QED made a claim against the Bond for $155,975.75, alleging that Atlas had underpaid QED by such amount (R-P. Ex. 1, p. 3).

Appellants Repeatedly Seek Production of QED's Damage Documents

9. In order to assess the validity of QED's claim, both Appellants requested in writing on February 12, 2002 (Addendum I) and February 27, 2002 (Addendum H) respectively, that QED provide a statement of account and all other documentation which would assist in evaluating QED's claim (R- P. Ex. 1, pgs. 11-12 and R-647-650). Specifically, Comtrol requested invoices, delivery tickets, and an "accounting demonstrating that" QED had not been paid for the materials (R-649) and that the materials had not been delivered before the cutoff dates of the lien releases QED had previously executed (R-647).

10. Instead of providing documentation, including the statement of account and supporting documentation, such as the invoices, accountings, payment ledgers and delivery tickets, QED simply filed suit against Appellants and Atlas on March 29, 2002 (R-1).

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[3]See, R-D. Ex. 20A (Comtrol ledger of payments to Atlas for Matheson Project)

11. Still doubting QED's claims, and because the amount sought by QED exceeded any amounts that could be established by Comtrol's accounting for the Matheson Project, Comtrol counterclaimed for an accounting (R-41, Comtrol's First Cause of Action), inasmuch as QED had "repeatedly failed and refused to provide an accounting" or any supporting documentation including delivery tickets (R-42, ¶ 7). Comtrol plead that QED's failure to document its claims should bar any "right to interest and/or attorney's fees." (R-42, 117 ¶ 8). QED insisted that Comtrol was not entitled to an accounting because it was not a shareholder of QED and not in contractual privity. (R-2224, p. 25).

12. On May 15, 2002, after having been served with the Complaint, USF&G, via letter to QED's counsel, again requested the documents that supported QED's claim (R-651) (Addendum J). No documents were provided by QED in response (R-965).

13. On January 15, 2003, QED made its Initial Disclosures (R-104-06) (the case had been stayed for several months due to the personal bankruptcy of Mr. Soofi (R-88-89)). The disclsoures included copies of 58 invoices (R-105)[4]. With respect to the damage computation required by Rule 26(a)(1)(C), QED stated only that "Pursuant to QED's complaint, QED is entitled to damages in an amount to be determined at trial." (R-105).

14. On June 20, 2003, Comtrol served its First Set of Interrogatories and First Request for Production of Documents on QED (R-133). Interrogatory Number 6 and Document Request Number 1 sought all of the information and documents supporting QED's

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[4] The 58 invoices originally produced are not part of the Record on Appeal, but are referenced in the Initial Disclosures, and eventually became part of R- P. Ex. 6.

claim for damages. The discovery requests specifically sought "any document relating" to QED's damages (R-664 and 671) and asked QED to admit that there were only 58 invoices that were the subject of the lawsuit (R-665A).

15. QED did not object on any basis to Comtrol's discovery requests. Instead, QED's discovery responses referenced the Complaint and QED's Initial Disclosure, and stated that "All known relevant documents were provided to the defendants in QED's Initial Disclosures." (R-670-71). QED admitted that there were only 58 invoices that were the subject of the lawsuit. (R-665A)

16. One month after admitting that there were only 58 invoices, counsel for QED wrote to counsel for Comtrol on August 26, 2003, indicating that he was in receipt of additional documents from QED, including additional invoices and a ledger statement, and represented that counsel for Comtrol could review the documents at his convenience (R-674). Counsel for Comtrol responded by requesting copies of **all** documents described in the August 26, 2003 Letter, and pointed out that "such additional invoices are in direct contradiction to QED's admission dated July 21, 2003." (R-676). The August 2002 production still did not have any checks, allocation instructions, nor ship tickets, but did include more invoices and an incomplete "Ledger Statement" (R-678-683).

17. The "Ledger Statement" was a 5 page printout from QED's computer dated August 11, 2003, and showed an outstanding balance of $533,795.26, instead of the

$155,975.75 demanded by QED in its complaint (R-P. Ex. 9, p. 3, right column). A copy of the "Ledger Statement" is attached hereto as Addendum "A".

18. Discovery closed on November 23, 2003 (R-111), and QED did not amend or supplement its discovery response that all of the damage documents had been produced. Trial was originally scheduled for May 10-12, 2005, but was continued to December 19-22, 2005. During the trial continuance, the Trial Court ordered the parties to mediation (R-411-412; 418).

19. On April 11, 2005, QED made its Pre-trial disclosures, before the trial scheduled May 10-12, 2005. No additional documents were produced in conjunction with QED's Pre-trial disclosures (R-421-25).

20. On April 29, 2005, counsel for QED indicated to counsel for Comtrol that, "To the extent there are documents that QED plans to introduce at trial which have not been produced previously, we will get these documents to you next week." (R-686). Yet, in spite of the representation by QED, no additional documents were produced at that time (R-966).

21. The trial was continued to December 19, 2005, due to counsel's illness with severe bronchitis. During the second trial continuance, the parties were directed to participate in mediation (R-517-8). Even with the trial continuance and mediation, QED still did not produce any of the checks, allocation instructions or ship tickets.

Documents Finally Produced by QED On the Eve Of Trial

22. On November 21, 2005, QED again made Pre-trial disclosures (R-693-97), but this time attached never before produced documents, bates-stamped QED 1274 - QED 1346

(R-698-770) (the "11th Hour Docments"). This was the first time QED had produced these documents. (R-967).

23. The 11th Hour documents contained copies of checks paid from Atlas to QED and payment instruction memos generated by Atlas, directing how the monies were to be allocated among the varies projects QED was supplying, including the Matheson Project. (R-698-770). The checks and instruction memos were dated October 24, 2000 to February 6, 2002, (over 3 years **before** their production by QED), and showed a total payment received by QED from Atlas and Comtrol of over $810,650.00 (R-532-601).

24. The 11th Hour documents also included spreadsheets entitled "AR by Check Detail for Atlas" showing how the payments from Atlas had been allocated by QED (see, e.g., R-700). On their face, these "Check Details" showed that they had been printed by QED on October 25, 2005, almost one month before QED produced them to counsel for USF&G and Comtrol. Id. QED had not previously produced *any* checks or the payment instruction memos related to the Matheson Project (R-967). In making its Pre-trial disclosures, QED offered no valid reason why it withheld these documents for 3 ½ years until the eve of trial (R-693-97).[5]

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[5]QED later offered the explanation that its new credit manager and new counsel were unaware that its old credit manager, Roger Minor, who ceased employment with QED in June of 2004 (R-986) and old counsel had not produced the documents, claiming that it was "impossible to know whether the Disputed Documents were 'reasonably available' at the time QED made its Initial Disclosures." (R-975). This argument overlooks that Mr. Minor was credit manager through the entire discovery process, which ended in November of 2003. It also assumes too much, namely that a party can cleanse a discovery violation simply by changing counsel, with new counsel then claiming ignorance of a lack of production.

25. The earliest check from Atlas produced with the 11th Hour Documents was dated October 24, 2000 for $98,926.47 (R-532). However, the "Reprint" invoices reference "Prior Deposits" as early as July 12, 2000; August 14, 2000; and September 15, 2000. See, e.g., (R-P. Ex. 9, pgs. 1-6). No checks have ever been produced corresponding to these dates and showing how these invoices were paid. No allocation instructions from Atlas have ever been produced showing how these three checks were to be allocated. No speadsheets from QED showing how it had, in fact, allocated these three checks have ever been produced. In other words, QED's own invoices establish that as late as the eve of trial, QED had not produced the full set of Atlas checks and damage documents for the Matheson Project.

26. QED eventually admitted that the 11th Hour Documents were in QED's possession well prior to their November 21, 2005 production (R-967).

First Motion For Discovery Sanctions

27. Because these documents went to the very heart of the accounting proof Appellants had sought from QED for over 3 ½ years since February 12, 2002 (R-649), they immediately filed a motion pursuant to Rule 37 asking the Trial Court to dismiss QED's case (R-627-770).

28. In support of their motion, Appellants described their extensive efforts to obtain these very documents and how QED misled them into believing that the documents did not exist (R-632-637). Appellants drew the Trial Court's attention to the "Ledger Statement" dated **August 11, 2003** (and included a copy of the Ledger as an exhibit to the motion (R-

678-682)), with the inescapable conclusion that QED had the 11th Hour Documents all along because someone at QED "had made handwritten notations on the spreadsheet [Ledger Statement] indicating which invoices related to the Project it contended were paid, and which invoices had not been paid" (R-634), yet, QED had refused to provide the "supporting documentation for the proposition that the invoices marked as paid had indeed been paid." (R-634).

29. Appellants also advised the Trial Court that during the court-ordered mediation on June 9, 2005, QED did not produce any of the 11th Hour Documents (R-634).

30. In asking the Trial Court to dismiss QED's complaint as a Rule 37 sanction, Appellants argued that they were severely prejudiced because QED interfered with Appellants' "ability to plan a defense strategy, conduct follow-up written discovery relative to the documents, depose the authors of the documents, and prepare expert witnesses to address the damage claims of" QED (R-641).

31. Alternatively, Appellants asked that the Trial Court not allow QED to profit "from its improper actions with an award against Defendants [Appellants] of prejudgment interest and legal fees (if Plaintiff [QED] prevails at trial), regardless of whether or not this Court allows the use at trial of the 11th Hour Documents or not." (R-643).

Second Motion for Discovery Sanctions

32. Before the Motion to Dismiss QED's complaint was heard by the Trial Court, QED produced yet another group of documents on December 7, 2005, now just seven business days before trial. The second set of documents were a selected portion of the ship

tickets Appellants had also requested for 3 ½ years. The ship tickets show delivery dates of the goods supplied to the Matheson Project (R-1107). This was additional supporting documentation Appellants had previously sought for the prior 3 ½ years, necessary to show that QED had included in its claim materials shipped **before** the cutoff dates of 6 lien releases executed by QED as follows:

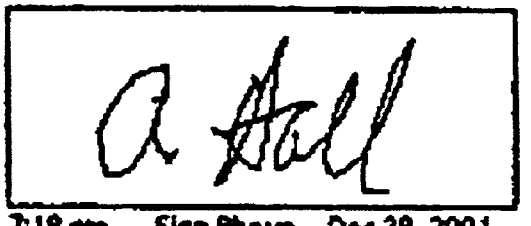
Lien Release Date	Cutoff Date for Materials Received
May 1, 2001	December 29, 2000
May 1, 2001	March 30, 2001
May 4, 2001	97% of Gear & December 29, 2000
July 25, 2001	May 31, 2001
November 7, 2001	September 30, 2001
January 23, 2002	November 30, [2001]

(R-P. Ex. 5, pgs. 1-6).

33. The delivery or ship tickets contradicted the dates shown on QED's invoices as the ship and receipt dates. Only the QED Invoices were introduced at trial (R-P. Ex. 6 and 7). For example, QED Invoice QED0025 for Shaper Lighting fixtures shows a ship date of "11/29/01" and a receipt date of "Dec 28, 2001", by "A Hall" (R-P. Ex. 6, pg. 25):

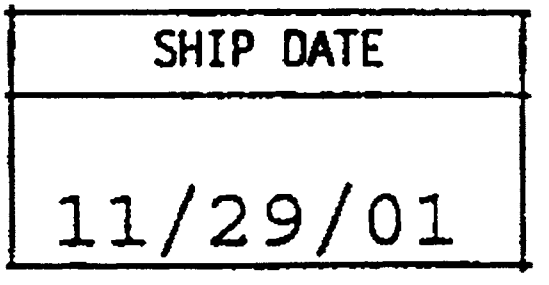
Invoice Receipt Date (Dec 28, 2001)

2. 08:00am - ATLAS ELECTRIC (
Manifest Number: M0015650



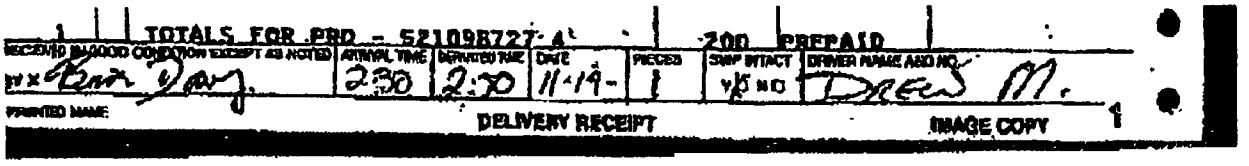
7:18 am Sign Above Dec 28, 2001
Print Name: A Hall

Invoice Ship Date



(R-Ptl. Ex. 6, pg. 25, highlight added)

Yet the corresponding ship ticket shows that the Shaper Light fixture was received by "Brian Davey" of Atlas on November 19, 2001, 10 days before QED's Invoice date, and 39 days **before** the Invoice Receipt Date of "Dec 28, 2001":



Shaper order - post 5119934b - inv# 106885

(R-1111, highlight added) A full page copy of Invoice QED0025 and the Ship Ticket are attached as Addendum "B".

34. QED's last minute production only contained ship tickets for 42 of the 58 invoices QED alleged were unpaid, with sixteen ship tickets still unaccounted for.[6] Consequently, it is impossible to know how many additional ship tickets for the allegedly unpaid invoices would reveal the same problems as appear with respect to the Shaper Order.

35. Again QED offered no valid reason why it had not produced any ship tickets until the eve of trial. Nor did QED ever explain why the production contained only a portion of the ship tickets, even at this late date. Instead, QED only represented that it had an

[6]Because QED did not attach the ship tickets to Pre-Trial Disclosures, they are not part of the record on appeal (with the exception of the Shaper ship ticket and one other ship ticket included in the record at R-1111-2).

"administrative assistant" select which ship tickets it would produce from boxes stored in QED's warehouse (R-1226-1227, affidavit of Mark Gavin). At no time did QED allow Appellants to inspect the boxes from which QED selected which ship tickets it finally produced. Appellants were not given any opportunity (nor could they inspect at this late date) to determine if there were still other ship tickets in QED's warehouse which also were relevant to Appellants' case.

36. Appellants quickly moved again ("Second Discovery Motion"), to exclude these documents as well, explaining that they had "been denied the opportunity to adequately address these documents via the discovery process, to have any expert analysis performed, or to fully assess the implications of these documents for QED's claims and their own defenses" (R-1102-04, 1107). While the Second Discovery Motion did not specifically request the Rule 37 Sanction of complaint dismissal, counsel for Comtrol & USF&G so requested orally at the hearing on both motions (R-2224. pg. 4).

37. At the hearing on the Motions to Dismiss QED's case (and alternatively *in limine*) held before the Trial Court on December 16, 2005 - just 1 business day before trial - counsel for QED described the 11th Hour Documents as:

> 20 . . . copies of checks
> 21 received by Atlas to pay Atlas' account with QED. And they
> 22 also consist of documents, the memo section of those checks,
> 23 you, that you--you get a check and you get a memo section
> 24 attached to it and that memo section with those checks shows
> 25 how Atlas would direct these funds to be paid, because Atlas had
> 1 several different job accounts with us, they had multiple
> 2 projects going and they may send in a check for $10,000 and
> 3 say, I want 2,000 to this job account, 5,000 to the job

4 account and so on.

(R-2224, pgs. 24-25).

38. In a moment of candor, counsel for QED advised the Trial Court that the 11th Hour Documents were so important that without them, "it potentially leaves me with an inability to meet my burden at trial to what I'm owed." (R-2224, pg. 26).

39. When asked by the Trial Court why these documents had not been produced earlier, counsel for QED admitted that the documents had been in QED's warehouse all along and were found when a secretary went through the boxes just before trial (R-2224, pg. 24). No other explanation was given why QED had not earlier considered these documents responsive to Appellant's numerous requests for such documents over the prior 3½ years. Instead, QED argued that "there cannot be any showing of prejudice or harm on the part of the defendants for receiving them three days before trial." (R-2224, p. 28).

40. The Trial Court denied Appellants' two motions to dismiss QED's Complaint under Rule 37 and granted the Motions in Limine, excluding the late produced documents (R-2224, pgs. 48-50). The Trial Court did not address Appellants' alternative motion that QED not be permitted to profit by an award of attorneys fees and interest for its failure to produce the 11th Hour Documents.

Pre and Post Judgement Interest Awarded by the Trial Court

In entering the Judgment in this case, the Court awarded Plaintiff 18% interest (R-1422; R-2142). Defendants argued that because they were not parties to the contract between Plaintiff and Atlas Electric, this was inappropriate. (R-1682-83). Instead, Defendants

argued, the postjudgment interest rate should be governed by Utah's postjudgment interest statute. (R-1682). That statute provides that judgments of the district court "shall bear interest at the federal postjudgment interest rate as of January 1 of each year, plus 2%." UTAH CODE ANN. § 15-1-4(3)(a). The Court disagreed with Defendants and awarded Plaintiff 18% interest on the amount of the judgment that actually related to the principal the Court determined was owed on the contract between Plaintiff and Atlas, the $103,052.06. (R-1422; R-2142).

QED then sought to have the 18% interest rate applied to the entire judgment (not just the principal) (R-1912-24). Appellants argued that allowing postjudgment interest to accure on prejudgment interest, rather than just the principal, amounted to compounding, a result not allowed in Utah jurisprudence without an agreement to compound between the parties. (R-1971). The Trial Court awarded 18% postjudgment interest on the prejudgment interest and principal portions of the judgment, and 6.37% on the attorneys' fees portion. (R-2075).

SUMMARY OF ARGUMENT

Even before this litigation was filed, Appellants suspected that something was amiss with respect to payment application. Comtrol had paid its electrical subcontractor, Atlas Electric, Inc. ("Atlas") more than the full contract amount. Despite this, QED wrote Appellants stating that it would be making a claim against the bond. Because Comtrol had paid Atlas more than the full amount of its subcontract, Appellants had several important affirmative defenses which they were entitled to develop and explore at trial, including: (1) that QED had been paid in full by Atlas; (2) that QED had not correctly applied those

payments it had received from Atlas; (3) that payments from Atlas had rendered conditional lien releases executed by QED effective; and (4) that materials which for which QED was seeking to recover payment had been delivered prior to the effective date of lien releases, such that the claims for payment were now barred.

Appellants immediately requested documents relevant to these defenses, including copies of all checks related to the project, an accounting, and ship tickets showing deliver of the goods. (Addenda H-J). Appellants' letters were followed by written discovery requests. QED did not respond to those requests, or provide the damage documents as part of Initial Disclosures, instead withholding the requested accounting documents during the entire discovery process, going as far as to represent to Appellants that the documents did not exist.

It was only on the eve of trial, when there was no time for Appellants to adequately analyze the documents, conduct follow-up discovery, fully develop their defenses, or designate and prepare expert witnesses to rebut QED's case, that QED produced a self-serving and incomplete portion of the requested documents (the "11th Hour Documents").

The 11th Hour Documents, produced in two batches, contained documents of the type that were critical to Appellants' defenses. The first batch, released 18 business days before trial, consisted of copies of certain checks and payment instructions showing the actual amounts QED was in fact paid and should have recognized with respect to those checks. The second batch of late documents, produced only 7 business days before trial, consisted of a portion of the delivery or ship tickets, which showed that certain electrical parts were delivered before the cutoff dates of the lien releases QED executed and not the dates QED

contained in QED's invoices. Without the 11th Hour Documents, and time to adequately assess their impact, Appellants were severely prejudiced in that they were deprived of the opportunity to offer a full and vigorous defense to QED's claims. Furthermore, the 11th Hour documents, when scrutinized, revealed that there were still additional material damage documents that had not been produced ("the Withheld Documents")[7]. Appellants moved to dismiss the case on the ground that failure to produce these material documents had deprived Appellants of the fundamental right to defend against QED's claims. The Trial Court denied the motion to dismiss, but excluded the documents from evidence, and allowed trial to proceed.

In the 3 ½ years leading up to the trial and QED's last minute release of hand-picked documents, QED had ignored letter requests for the damage documents (Addenda H-J), ignored its Initial Disclosure obligations, and led Appellants to believe that the 11th Hour Documents and the Withheld Documents did not exist when responding to Appellants' written discovery requests asking for the documents. Yet, the documents did exist and were simply sitting in QED's warehouse. The 11th Hour Documents and the Withheld Documents QED failed to produce were unavailable to Appellants from any other source because Altas went out of business and left the state. QED's withholding of the 11th Hour Documents until just before trial, coupled with its failure to ever produce the Withheld Documents, prevented Appellants from adequately developing their defenses and severely prejudiced them at trial.

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[7]Described in more detail in footnote 1 and Fact 25.

The Trial Court only sanctioned QED by excluding the 11th Hour documents from being presented as evidence at trial. While a trial court's discovery sanction should be given great deference and in almost all cases left undisturbed, in this case exclusion was grossly insufficient; indeed, dismissal of QED's Complaint was the only appropriate sanction under the circumstances, in that it was the only remedy that would address the fact that Appellants had been denied their right to develop and present affirmative defenses to QED's allegations of non-payment. The 11th Hour Documents and the Withheld Documents were material to QED's burden of showing that it had not been paid. Forced to try the case without the benefit of the Withheld Documents, Appellants were denied the opportunity to develop fully their defenses that (1) QED had been paid more monies than QED recognized at trial, and had in fact misallocated funds; (2) that 6 lien releases signed by QED were properly funded and thereby served as waivers of QED's claims; and (3) that goods had been shipped prior to the effective date of lien releases, thus barring QED's right to recovery.

After the Trial Court denied Appellants' pretrial Motions to sanction QED by dismissing its Complaint (of which Appellants seek this Court's review), the case went to trial on December 19-22, 2005. Even without the 11th Hour Documents and the Withheld Documents, Appellants were able to show that QED had misapplied payments contrary to Comtrol's instructions. On November 13, 2001, Comtrol had paid QED by joint check for $85,383.19, (R-2133) specifically instructing that the full amount be given to QED to pay for the Matheson project (D-Ex. 15; R-2222, pgs 589-91). However, QED and Atlas privately agreed not to follow Comtrol's instructions. QED endorsed the check over to Atlas, and

accepted only $51,123.76 from Atlas in return (R-2134, ¶ 52). The Trial Court held that, as a result of its disregard for the directions of Comtrol, QED was estopped from collecting $34,259.43, the difference between the joint check and the $51,123.76 QED received back from Atlas (R-2137, ¶ 12). Because the 11th Hour Documents and the Withheld Documents were withheld, Appellants were denied the opportunity of developing additional evidence of payment misapplication.

Finally, the 18% pre and postjudgment interest rate taken from the contract between QED and Atlas is inapplicable to bond claims. QED had no privity with Appellants, rendering a market rate more appropriate than the 18% prejudgment awarded by the Trial Court. Similarly, the statutory postjudgment interest rate is more appropriate than the 18% postjudgment interest awarded by the Trial Court. The Trial Court erred in awarding 18% interest, and allowing for the interest to be compounded.

ARGUMENT

I. BECAUSE DISMISSAL WAS THE ONLY SANCTION THAT WOULD ADEQUATELY ADDRESS QED'S DENYING APPELLANTS OF THE RIGHT TO ESTABLISH THEIR DEFENSES, THE TRIAL COURT ERRED IN FAILING TO DISMISS QED'S CLAIM AS A DISCOVERY SANCTION.

Trial courts are given "broad discretion" in fashioning appropriate remedies for discovery abuses. Coxey, 112 P.3d at 1246. Only in cases where a trial court's choice of sanctions for a discovery violation is an abuse of discretion should the be reversed. Aurora Credit Servs v. Liberty West Dev., Inc., 129 P.3d 287, 291 (Utah Ct. App. 2006). Because dismissal was the only appropriate sanction here, this is such a case.

The Trial Court's decision to allow QED to proceed with its case after the Trial Court had excluded documents that QED admitted it had not timely produced, which documents revealed that QED's production was still incomplete, offended the very spirit of Rule 26 and the discovery obligations imposed by the Rules of Civil Procedure.[8] QED flouted the basic requirements of Rule 26 by withholding key documents that were relevant and necessary to Appellants' defenses until the eleventh hour. The 11th Hour Documents (produced, in the case of the Ship Tickets, just 7 days before Trial), were in QED's possession all along and on QED's computer system well before QED filed its Complaint on March 29, 2002. Appellants repeatedly requested these documents over a 3 ½ year period by letter (Addenda H-J) and by discovery requests. Yet, QED withheld the 11th Hour Documents from Control and USF&G until November 21, 2005, and December 7, 2005 in the case of the Ship Tickets, springing the documents on Appellants on the eve of trial, when Appellants had no opportunity to conduct any discovery or expert analysis of the documents.[9] The 11th Hour Documents betrayed the falsity of QED's earlier representation that all relevant documents had been produced, and showed on their face that they were incomplete, with at least three

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[8]While this conclusion is mandated by the contempt for the discovery process exhibited by QED, it is further buttressed by QED's admission that the court's exclusion of the 11th Hour Documents left it "with an inability to meet [its] burden at trial to what [it was] owed" (R-2224, pg. 26). If the 11th Hour documents were material to QED's showing, they (and the Withheld documents) were at least as material to Appellants' defenses.

[9]Such expert witness evaluation and follow up discovery would have included at a minimum an assessment as to whether or not QED had followed its own policy and allocated the payments in accordance with Atlas's instructions; a determination whether all of the Atlas checks and allocation memoranda were produced and accounted for, etc.

checks and the related allocation documents missing from the 11th Hour documents. In situations as egregious as this, Rule 37 demands the dismissal of QED's case as the only appropriate sanction for QED's disregard of the most basic components of the litigation process, and the corresponding denial of Appellants' right to develop and present valid affirmative defenses to QED's claims of non-payment. Consenquently, the Trial Court abused its discretion in not dismissing QED's case.

A. By Failing to Produce the 11th Hour Documents Until the Eve of Trial, and by Failing to Ever Produce the Withheld Documents, QED Violated its Obligations Under Rule 26 of the Utah Rules of Civil Procedure.

QED violated Rule 26's Initial Disclosure requirements when it failed to provide a "computation of any category of damages claimed ... making available for inspection and copying as under Rule 34 ***all discoverable documents*** or other evidentiary material on which such computation is based, including materials bearing on the nature and extent of injuries suffered." UTAH R. CIV. P. 26(a)(1)(C) (emphasis added).

QED made no attempt in its Initial Disclosures to provide Comtrol or USF&G with a "computation of damages," much less "all discoverable documents" relating to its damages, including accounting documents, copies of checks from Atlas, or any other documents that would allow the Appellants to assess the merits of QED's claims or develop their defenses to QED's claims. Instead, QED's Initial Disclosures referred Appellants to the Complaint, which merely set forth the amount claimed. (R-105). What could be more fundamental to Rule 26(a)(1)(C)'s obligations than the checks which QED had been paid, and documents

showing how those checks had been allocated? Without these documents, how could Appellants be expected to assess whether QED had, in fact, not been paid?

QED's failure to produce is rendered particularly troublesome where many of the 11th Hour Documents bear dates pre-dating the filing of the Complaint (for example, R-532, a check dated October 24, 2000 v. March 29, 2002, the date the Complaint was filed), indicating that QED had them in its possession when it filed the Complaint and should have produced them with its Initial Disclosures. It was apparently only in October 25, 2005 (the date on which many of the 11th Hour Documents were printed from QED's system, see, e.g., R-537) that QED began to re-think its decision of withholding the documents relevant to Appellants' damage defenses.

QED compounded its failure to produce by its responses to discovery requests seeking all damage documents (Fact 14). QED knew that Appellants considered this group of documents to include copies of checks and ship tickets, because Appellants had already requested those documents in letters sent both before commencement of the litigation, and after the Complaint had been filed. (Facts 9 and 12) (Addenda H-J). Despite knowing which documents Appellants were seeking, and despite the fact that such documents were in its possession, QED's answer was that "All known relevant documents were provided to the defendants in QED's Initial Disclosures." (R-670-71). This response was misleading, in that the reasonable implication was that QED was not in possession of checks, shipping tickets, or other accounting documents supporting its damage claims.

Thus, despite clear and focused questions from Comtrol seeking to understand and evaluate QED's assertion of damages, QED produced no relevant documents supporting its damage claim, no checks and no accounting documents. It did not even describe the 11th Hour Documents, or the Withheld Documents. Rule 26(e) imposes a "...duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission...." No reasonable argument exists that QED's last-minute documents were provided "seasonably" where they were provided six months after the initial trial date and on the eve of the December 19, 2005 trial. QED violated Rule 26 in the most fundamental way possible, and its claim should have been dismissed.

B. QED's Withholding of the 11th Hour Documents until the Eve of Trial, Coupled with its Failure to Ever Produce the Withheld Documents, Materially Prejudiced Appellants' Efforts to Defend Against QED's Claims.

In determining the appropriate sanction for a discovery violation, "a court should consider ... the degree of actual prejudice to the defendant." Ehrenhaus v. Reynolds, 965 F.2d 916, 920 (10th Cir. 1992). There can be no more tangible prejudice than the denial of the right to develop affirmative defenses. The failure of QED to produce timely material damage documents denied Appellants the very documents they needed to show that QED had, in fact, been paid, and interfered with their ability to plan a defense strategy, conduct follow-up written discovery relative to the documents, depose the authors of the documents, and prepare expert witnesses to address QED's damage claims. As such, Appellants suffered palpable harm created by the lengthy suppression of and subsequent last-minute disclosure

of the 11th Hour Documents,as well as the failure to produce the Withheld Documents, including at least the following:

1. Appellants were denied any opportunity to explore why QED had not been paid in full where Atlas received more than the full contract amount.

From the moment they received notice of QED's bond claim, Appellants were concerned that its payment instructions had not been followed. Throughout the project, Comtrol had requested and received assurances from Atlas that QED had been paid for the materials it had provided. See, e.g., D. Ex. 2; R-2222 pgs. 538-39. Comtrol had paid Atlas more than its full subcontract price. (Fact 7). Despite this, QED was now representing that it had not been paid. Had QED come forward with copies of all checks it had received for the Matheson project, Appellants could have analyzed what had gone wrong. However, having never received a full set of checks from QED, Appellants do not know to this day what happened to the money Comtrol paid to Atlas.

2. Appellants were denied the opportunity to show that QED had not properly credited all of the monies it had received from Atlas and Comtrol for the Matheson Project.

Because Comtrol had paid Atlas more than its full contract amount, a key theory which Appellants were entitled to argue at trial was that QED had received payments for the Matheson Project which it had not properly allocated to the project. The best evidence of QED's allocation of payments was contained in the 11th Hour documents, and the Withheld documents, namely the spreadsheets showing how Atlas had instructed that checks be allocated, and the spreadsheets showing how QED had, in fact, allocated these checks.

However, the earliest check and allocation information from Atlas produced with the 11th Hour Documents was dated October 24, 2000 for $98,926.47 (R-532). Combined with the fact that the "Reprint" invoices reference "Prior Deposits" as early as July 12, 2000; August 14, 2000; and September 15, 2000 (See, e.g., (R-P. Ex. 9, pgs. 1-6)), this shows that QED never produced the full set of Atlas checks for the Matheson Project.[10] Consequently, Appellants were denied the evidence they needed to show that QED had not correctly allocated the money it received from Atlas and/or Comtrol.

QED's testimony and trial exhibits highlighted this deficiency. On cross examination, Mr. Dahl, QED's Branch Manager, admitted that even the "Prior Deposit" invoices did not show all of the monies paid by Atlas and how those monies were allocated.

> Q. My question is, though, there is nothing in these documents that help us determine if in fact QED properly allocated the moneys that it received from Atlas; isn't that true?
> A. Yeah, probably true.

(R-2220, pg. 119).

Mr. Dahl testified that the total amount billed by QED for the Matheson Project was $669,078.78 (R-2220, pg. 94), and that the unpaid balance was $143,189.14 (R-2220, pg. 69). In stark contradiction to Mr. Dahl's testimony, the unpaid balance set forth on QED's

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[10]Depending on the amount of the payments received on these three dates, the balance owed to QED could change dramatically. If each of these three missing checks was for $50,000, QED's entire account balance would be entirely erased. However, because the checks have never been produced, neither the Trial Court, nor this Court, nor Appellants can ever know.

"Ledger Statement" was set forth as $533,795.26 (R-Pt. Ex. 9, pg. 3 (Right column), attached as Addendum "A").[11] The balance due could not be both $143,189.14 and $533,795.26 at the same time.

QED's failure to timely produce checks and allocation instructions for the project (and failure to EVER produce a full set of the checks) denied Appellants their right and opportunity to assess the evidentiary reasons for this almost $400,000 discrepancy and show that payments had been misapplied contrary to instructions.

Appellants' payment misapplication concerns are not based on speculation. Even without the 11th Hour Documents and the Withheld Documents, Appellants were able to show that QED had misapplied payments contrary to Comtrol's instructions. On November 13, 2001, Comtrol had paid QED by joint check for $85,383.19, (R-2133) specifically instructing that the full amount be given to QED to pay for the Matheson project (D-Ex. 15; R-2222, pgs 589-91). However, QED and Atlas privately agreed not to follow Comtrol's instructions. QED endorsed the check over to Atlas, and accepted only $51,123.76 from Atlas in return. (R-2134, ¶ 52) The Trial Court held that, as a result of its disregard for the directions of Comtrol, QED was estopped from collecting $34,259.43, the difference between the joint check and the $51,123.76 QED received back from Atlas (R-2137, ¶ 12).

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[11]This was because the "Ledger Statement" only showed some of the credits received by QED; it clearly did not show all of the credits received, because QED did not give credit on this document for any payments received pursuant to a check containing payments for multiple projects. R-Pt. Ex. 9, pg. 3; R-2220, pgs. 53-54.

Because the 11th Hour Documents and the Withheld Documents were withheld, Appellants were denied their right to show additional evidence of payment misapplication.

3. Appellants were Prejudiced in being Prevented From Showing that Lien Releases Barred QED's Recovery.

During trial, the Trial Court admitted into evidence six lien releases executed by QED (R-Ptl. Ex. 5, admitted at R-2225, pg.480). Appellants' defense that they were entitled to develop and present was that the lien releases had waived QED's rights to collect certain of the allegedly unpaid invoices. Appellants could have pursued this defense in two ways if the 11th Hour documents and the Withheld Documents (including the full set of ship tickets and checks) had been timely produced.

First, with the full set of checks and allocation instructions, Appellants could establish that QED was paid the full amount of the releases, making them effective. Second, with the full set of ship tickets, Appellants would be able to show that the materials in question were received before November 30, 2001, the cutoff date of the January 23, 2002 Lien Release (R-Ptl. Ex. 5, pg. 6). Instead, by simply changing the date of an invoice so that it was dated after a lien release, rather than before, QED had the potential to completely eviscerate the value of these releases to USF&G and Comtrol and wrongfully escape the legal effect of the releases. See, e.g., Neiderhauser Builders and Dev. Corp. v. Campbell, 824 P.2d 1193, 1197 (Utah Ct. App. 1992) (enforcing waiver of lien rights as binding).

The prejudice to Appellants is highlighted by examining the last lien release for the project, which was dated January 23, 2002, and stated that QED, upon receipt of $80,816.91:

> does hereby release Comtrol. . .[of] any and all mechanic's lien, stop notice, claims, and/or demands for or on account of labor, services, equipment, and/or material furnished by the undersigned to and including the 30th day of November [2001] purchased by Atlas Electric for use in or on the Magna New Jr. High project property.
>
> The undersigned also releases and waives all right of action against the Bonding Company. . . (R-P. Ex. 5, pg. 6)

Of the 58 invoices QED introduced at trial as unpaid (R-P. Ex. 6), 25 were for materials delivered on or before November 30, 2001 (according to the Invoices themselves, not the ship tickets), representing $70,235.96 of the total damages awarded QED by the Trial Court (R-P. Ex. 6, pgs. 1-15). At trial, QED offered no testimony on whether or not QED received the $80,816.91 required as a condition for the November 30, 2001 Lien Release.

However, evidence obtained from the ship tickets that were produced gives rise to the implication that the release may have been funded, because shipment dates had been changed from *before* the effective date of the release (when QED would be barred from collecting) to *after* the effective date of the release (when the release would not serve as a bar to recovery). QED Invoice QED0025 for Shaper Lighting fixtures shows a ship date of "11/29/01" and a receipt date of "Dec 28, 2001", by "A Hall" (R-P. Ex. 6, pg. 25). However, the corresponding ship ticket shows that the Shaper Light fixture was received by "Brian Davey" of Atlas on November 19, 2001, 10 days before QED's Invoice date, and 39 days **before** the Invoice Receipt Date of "Dec 28, 2001."[12] If the materials were not delivered until December 28, 2001, as claimed on the invoice, they would not be subject to the release.

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[12]For images of the relevant invoice and ship ticket, see Fact 33, and Addendum B.

Delivery on November 19, 2001, as set forth on the ship ticket, would render the goods subject to the lien release and thereby cut off QED's claim that it had not been paid for such goods. QED's 58 Invoices, without any corrected delivery dates, showed that at least $70,235.96 of QED's "unpaid for" goods were delivered on or before November 30, 2001 (R- P. Ex. 6, pgs. 1-25).

Without all the ship tickets and all the checks, Appellants could not further develop the effect of the releases. Thus, Appellants were irreparably prejudiced by QED's discovery violations.

4. Appellants were denied the Opportunity to Establish that QED had "gambled with the surety's money" by endorsing Joint Checks.

A materialman who elects to allow a subcontractor to keep joint check funds "is literally gambling with the surety's money." Brown Wholesale Elec. Cot. v. Beztak of Scottsdale, Inc., 774 P.2d 1372, 1376 (Ariz. Ct. App. 1989). Comtrol wrote several joint checks to QED for the Matheson Project. At trial, QED admitted that it disregarded Comtrol's instruction that such checks be completely applied to the Matheson project with respect to at least one check. (R-2133-34; R-2137). This admission reduced QED's total judgment by almost $35,000.00. However, without Atlas' directions as to how these joint checks were to be applied, Appellants were denied their opportunity and right to show that QED was gambling with USF&G's money and develop the evidence supporting it.

5. Appellants were denied any opportunity to develop the defense that QED had misapplied payment as between jobs.

QED admitted to having several active jobs for Atlas during the period it was supplying the Matheson Project (Fact 5). Atlas made payments to QED in lump sums to be allocated among the various projects QED was supplying at the time. QED's policy was to honor such directives (Fact 6). However, the only way to test whether QED had, in fact, honored those directives was to compare the allocation instructions of Atlas to the allocations actually made by QED. Without the 11th Hour Documents and the Withheld Documents (including a full set of checks, and a full set of Atlas' allocation instructions), Appellants were denied their right to show that QED had not correctly credited all of the monies paid for the Matheson Project to that project.

6. Appellants were denied their right to discredit QED's "Ledger Statement" which admittedly did not show all of the payments QED received.

QED's accounting documents (R-P. Ex. 9) were missing key information, rendering it nearly impossible for Appellants or the Trial Court to reach a conclusion as to the amount of damages suffered by QED. QED's "A/R Ledger Inquiry" (the first document in P. Ex. 9) contained a handwritten notation showing that QED had received $520,246.66 in payment for the job.[13] However, the document itself only contains credits totaling $135,083.52, and shows a balance due of $533,795.26. P. Ex. 9 at QED0124-28 (Addendum A). QED's

[13]The Trial Court excluded this hand-written evidence and received QED's Exhibit 9 in redacted form. (R-2222, p. 59). Nevertheless, the handwritten notations are indicative of the paucity of the evidence QED presented as to what it had been paid. Presumably, before the Trial Court excluded the handwritten notations, QED intended to rely on them as evidence of what it had been paid, and what amounts remained due and owing.

witness, Mr. Dahl, freely admitted that the credits shown on the "A/R Ledger Inquiry" were not all of the credits received by QED, in that Atlas would often send checks to QED for payment to multiple accounts or jobs,[14] and any such credits were not acknowledged or accounted for on QED's Ex. 9. (R-2222 p. 54). As such, the A/R Ledger Inquiry did not show what was paid by Atlas or Comtrol for the Matheson Project, or what was still owing for the project.

Thus, QED's accounting documents were the functional equivalent of a monthly bank account statement from which the bank has removed the bulk of the deposit information and asked the account owner to trust the banks' representation as to the correct balance. Such a statement would be of very little value to the owner of the account in determining what happened to her money. Similarly, without documents showing what payments QED had received from Atlas, Appellants could not rebut QED's oral testimony as to which invoices had been paid. These ommissions effectively prevented Appellants from addressing the most fundamental portion of QED's case, its allegations of non-payment.

7. QED was awarded interest during the entire time the 11th Hour Documents and the Withheld Documents were withheld.

When Appellants moved to dismiss QED's complaint, they also argued that QED should not be allowed to profit from its belated disclosures by collecting pre-judgment interest. (R-642-43). The Trial Court disagreed, and awarded QED prejudgment interest at

[14]QED was supplying materials to at least four other Atlas jobs during the Matheson Project, including Nellis Air Force Base, Alta View Women's Center, Chapel Glenn and the Connor Road Project. (R-2222, p. 120-23).

18% for the duration of the Complaint. At 18% on more than $103,000 over 3.5 years (the period during which the 11th Hour documents were not disclosed) more than $65,000 in prejudgment interest accrued while certain of QED's material damage documents had not been produced. Despite never producing the Withheld Documents, QED continued to collect prejudgment interest until the Trial Court entered judgment.

8. QED was Awarded Attorneys' Fees during the entire time the 11th documents were withheld, asserts a right to the fees incurred during this appeal, despite never having produced the Withheld Documents.

Appellants also argued at trial that QED should be disallowed attorneys' fees as a sanction for late production (R-642-43). The Trial Court denied that request. The sad irony is that QED gained financially by withholding the 11th Hour Documents, in that the attorneys fees awarded it by the Trial Court include significant hours spent by QED's counsel opposing Appellant's motions in limine to exclude the documents (R-1457-62) (and drafting a never-filed *Motion to Set Aside Order in Limine*, presumably referring to the ruling excluding the 11th Hour Documents (R-1462). Thus, not only did the Trial Court fail to sanction QED properly for failing to produce material documents, the Trial Court inadvertantly rewarded QED financially for QED's failure.

QED was also awarded its attorneys fees for the entire lawsuit, which may have settled or been dismissed on dispositive motions had QED timely produced the 11th Hour Documents and the Withheld Documents.

Had Appellants received the 11th Hour documents and the Withheld Documents at the outset of the litigation, as required by Rule 26, they could have determined the amount QED

had not been paid and included that amount in an offer of judgment. Appellants made two offers of judgment in the course of the litigation (R-1503). However, because Appellants knew that Comtrol had paid Atlas the full subcontract amount, and because QED's damage proof was so weak at the point they were made, Appellants could not know the true balance, and their offers of judgment were for less than QED was ultimately awarded at trial. Id. With better information as to what QED had actually been paid, higher offers may have been made that would have saved Appellants' attorneys' fees.

9. Appellants were prejudiced because they relied on QED's discovery representation that all documents had been produced, which in fact was false.

QED suggested in opposing Appellants' motion to dismiss as a discovery sanction that Appellants should have subpoenaed the 11th Hour documents from third parties (R–976) or conducted follow-up discovery with QED. See, R-980 (speculating that "Defendants likely would not have issued additional written discovery even if they would have had the Disputed Documents."). This argument overlooks the fact that QED represented in response to Appellants' written discovery requests that all responsive documents had been produced (Fact 15). Appellants were reasonable in relying on QED's response, where QED did not claim that the documents had been destroyed, or placed in the possession of third parties. QED's answer implied that there were no responsive documents, no copies of checks, no allocation instructions, and no ship tickets. Appellants planned for trial, and made decisions about designations of experts with QED's statement in mind, and were completely blind-sided by the mountain of material damage information provided at the last minute.

10. Appellants were denied any opportunity to inspect the boxes that the secretary examined to decide which documents related to the case and Appellants' defenses.

QED's last minute production was conducted by an unidentified administrative assistant on a tour through QED's warehouse. Appellants were not allowed to inspect the boxes from which the checks and ship tickets were drawn. They were not allowed to assure themselves that complete sets of checks and ship tickets were finally being produced (this was clearly not the case). Thus, Appellants cannot know whether documents that support its theories (i.e., an undisclosed $200,000 check from Atlas to QED for the Matheson project) were originally mixed in with the 11th Hour Documents. Rule 34 specifically contemplates such an inspection. See, Utah R. Civ. P. 34(a)(1) (discussing litigants' inspection rights).

11. Appellants' trial preparations were limited due to Attorney time spent analyzing 11th hour documents and not preparing for trial.

QED gained an unfair advantage over Appellants at trial by its last-minute production. Until counsel for Appellants were certain that the new financial documents would be excluded (which only happened on the Friday before trial in the case of one set of 11th Hour Documents, and on the morning of trial in the case of the shipping tickets), significant time had to be dedicated both to analysis of the documents and drafting of motions to dismiss and motions in limine. Appellants' counsels' time records show that over forty hours were spent in this process during the weeks before trial (R-1495-97), limiting the time that could be spent preparing for the document universe that would ultimately be allowed at trial. Thus,

QED's belated production gave it a distinct tactical advantage, in that QED was able to divert Appellants' counsel's focus from important trial preparation.

C. Rule 37 contemplates the dismissal of QED's claims as a sanction for discovery abuses as egregious as have occurred here.

Under Rule 37, Trial Courts have authority to dismiss an action as a sanction for a party's failure to comply in the discovery process. Rule 37(f) provides in pertinent part:

> **Failure to disclose**. If a party fails to disclose a ... document ... as required by Rule 26(a) ... or to amend a prior response to discovery as required by Rule 26(e)(2), that party shall not be permitted to use... the document ... at any hearing unless the failure to disclose is harmless or the party shows good cause for the failure to disclose. In addition to or in lieu of this sanction, the court may order any other sanction, including payment of reasonable costs and attorney fees, any order permitted under subpart (b)(2)(A), (B) or (C) and informing the jury of the failure to disclose.

Paragraph C of subdivision (b)(2) further provides that the court may impose "an order striking out pleadings or parts thereof, staying further proceedings until the order is obeyed, dismissing the action or proceeding or any part thereof, or rendering judgment by default against the disobedient party." UTAH R. CIV. P. 37(b)(2)(C).

With respect to interrogatories and requests for production, Rule 37(d) "allows a court to impose sanctions against a party for disregarding discovery obligations even when that party has not directly violated a court order specifically compelling discovery." Scholey v. Memorial Estates, Inc., 790 P.2d 584, 585 (Utah Ct. App.1990); see, e.g., W.W. & W.B. Gardner, Inc. v. Park W. Vil. Inc., 568 P.2d 734, 738 n. 9 (Utah 1977) ("'No court order is required to bring [rule 37(d)] into play. It is enough that a notice of the taking of a deposition

or a set of interrogatories or a request for inspection has been properly served on the party.'"(citation omitted)).

Consequently, Utah jurisprudence contains a long line of cases dismissing complaints for failure to comply with discovery obligations. See, e.g., Aurora Credit Servs v. Liberty West Dev., Inc., 129 P.3d 287, 291 (Utah Ct. App. 2006) (upholding dismissal for failure to serve interrogatory responses until six days after they were due); Coxey v. Fraternal Order of the Eagles, Aerie No. 2742, 112 P.3d 1244 (Utah Ct. App. 2005) (upholding dismissal as sanction for withholding a videotape until trial); Hales v. Oldroyd, 999 P.2d 588 (Utah Ct. App. 2000) ("No finding of a 'complete failure' to comply with discovery is required. Indeed, dismissal as a discovery sanction has been upheld for late or incomplete discovery responses."); Tuck v. Godfrey, 981 P.2d 407 (Utah Ct. App. 1999) (upholding dismissal for late discovery responses because "Under [r]ule 34, parties have thirty days in which to serve a written response to discovery requests. Failure to respond in the appropriate time frame may subject the noncomplying party to sanctions under [r]ule 37." (citation omitted)); Morton v. Continental Baking Co., 938 P.2d 271 (Utah 1997) (upholding dismissal as sanction for being a day late in answering interrogatories); W.W. & W.B. Gardner, Inc. v. Park W. Vill., Inc., 568 P.2d 734, 738 (Utah 1977) (affirming default judgment pursuant to rule 37, where defendant failed to respond to discovery within thirty days, because "[a] defendant may not ignore with impunity the requirements of [r]ules 33 and 34, and the necessity to respond within thirty days").

Dismissal is warranted where a litigant engages in "persistent dilatory tactics frustrating the judicial process." W.W. & W.B. Gardner, 568 P.2d at 738 (finding that no showing of bad faith is necessary for entry of default judgment as discovery sanction, where party has persisted in dilatory tactics). "No wrongful intent need be shown." Utah Dep't. of Transp. v. Osguthorpe, 892 P.2d 4, 8 (Utah 1995). In W.W. & W.B. Gardner, Inc. v. Park West Village, Inc., the Utah Supreme Court upheld dismissal of a complaint for failure to answer interrogatories, noting:

> Under Rule 37(d) sanctions are justified without reference to whether the unexcused failure to make discovery was wilful. The sanction of default judgment is justified ***where there has been a frustration of the judicial process***, viz., ***where the failure to respond to discovery impedes trial on the merits and makes it impossible to ascertain whether the allegations of the answer have any factual merit.***

568 P.2d at 738 (emphasis added). This is precisely what happened here. QED's withholding of documents frustrated the judicial process, drastically impeded trial on the merits, and has rendered it impossible for this Court, the Trial Court, or Appellants to determine whether QED's claim that it was not paid was accurate, or whether QED was in fact paid-in-full on its contract with Atlas. As was demonstrated above, Appellants have been severely prejudiced by QED's last-minute production of damage documents, in that they were denied their right to develop and present material affirmative defenses. [15]

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[15]QED has argued, with respect to the issue of prejudice, that "there cannot be any showing of prejudice or harm on the part of the defendants for receiving them three days before trial." R-2224, pg. 28. ll. 2-4.

QED's delay in not producing material documents for 3 1/2 years, coupled with its representation that all relevant documents had been produced, constitutes far more egregious conduct than was found in many of the Utah cases where dismissal has been upheld. See, e.g., Aurora Credit Servs., 129 P.3d at 291 (failure to serve interrogatory responses until six days after they were due); Coxey, 112 P.3d at 1244 (withholding a single videotape until trial); Hales, 999 P.2d at 593 (Utah Ct. App. 2000) (failure to answer requests for production within thirty days); Tuck, 981 P.2d at 412-13 (Utah Ct. App. 1999) (failure to respond to requests for production and interrogatories within thirty days); Morton v. Continental Baking Co., 938 P.2d at 277 (Utah 1997) (reinstating trial court's default entered against motorist who replied to interrogatories **one day** after extended discovery deadline)); W.W. & W.B. Gardner, Inc. v. Park W. Vill., Inc., 568 P.2d 734, 738 (Utah 1977) (failure to respond to discovery within thirty days). In contrast, QED made an affirmative representation that all relevant documents had been produced, which representation was shown to be false when it produced material documents on the eve of trial. Additionally, QED has still not produced the Withheld Documents.

Indeed, dismissal is the only remedy that can address prejudice as severe and palpable as has been suffered by Appellants. No other sanction can address the fact that documents were (and continue to be) withheld that go to the core of QED's damages claims and Appellants' defenses to those claims. No other sanction can address the fact that QED did not produce the documents that would allow Appellants to know what amounts QED had

been paid by Atlas for the Matheson project. No other sanction can address the fact that QED did not produce the payment documents that would allow Appellants to assess the effect of lien releases signed by QED. No other sanction can address the fact that QED refused to produce ship tickets that would allow Appellants to assess when goods were actually delivered to the project, such that QED's claims for payment of those goods were barred by lien releases. No other sanction can address the windfall of substantial attorneys' fees and 18% prejudgment interest realized by QED despite its failure to produce. No other sanction can address the fact that QED has been financially rewarded for its belated production, in that it has been awarded attorneys' fees for the hours spent opposing Appellants' Motions in Limine. Because no other sanction was appropriate, the Trial Court abused its discretion when it chose a lesser sanction.

Therefore, this Court should reverse the Trial Court's denial of Appellants' Pretrial Motion to Dismiss QED's Complaint.

II. AS A MATTER OF LAW, QED IS NOT ENTITLED TO COMPOUNDED 18% INTEREST.

The Trial Court erred in concluding that USF&G and Comtrol, parties who had no privity with QED, should be required to pay QED the 18% interest it was entitled to under its contract with Atlas. The Trial Court was faced with a spectrum of potential rates with respect to its prejudgment interest award: (1) a market rate; (2) the ten percent statutory rate of UTAH CODE ANN. § 15-1-1(2); or (3) the 18% specified in the contract between Atlas and

QED. Under clearly established principals of Utah law, the appropriate choice is the market rate.

The Trial Court also erred in awarding postjudgment interest at 18%, based on the plain language of UTAH CODE ANN. § 15-1-4(2)(a). The judgment in this case is not a "judgment rendered on a lawful contract." Neither Comtrol nor USF&G were parties to QED's contracts with Azam Soofi and Atlas Electric, Inc. (QED already had a default judgment against Atlas for the principal and 18% interest, which judgment may be subject to the provisions of the agreement between QED and Atlas) (R-98). Instead, QED's judgment against USF&G was based on its statutory payment bond claim, not on any contract claim against USF&G or Comtrol, both entities with whom QED had no contractual privity. As such, there was no "interest [rate] agreed upon by the parties" for the Court to apply.

A. QED is not Entitled to the 18% Interest Set Forth in its Contract with Atlas.

QED's right of action against the payment bond arose from the provisions of the Utah Procurement Code, not from the terms of its agreement with Atlas. See, UTAH CODE ANN. § 63-56-504(4) (creating right of action on payment bond for persons furnishing labor, service, equipment or materials for construction contracts awarded under the procurement code); U.S. Filter Distrib. Group Inc. v. Katspan, Inc., 72 P.3d 1103, 1108 (Wash. Ct. App. 2003) ("A surety's liability to subcontractors and suppliers is governed by the surety statute and the surety agreement . . . .").

As a result, the terms of the Utah's procurement law and the surety bond itself govern an award of interest, not the contract between QED and Atlas. See, id. (reversing award of 18% interest found in contract between subcontractor and supplier); see also, R.W. Sidley, Inc. v. U.S. Fidelity & Guar. Co., 319 F.Supp. 2d 554, 559 (W.D. Pa. 2004) (analyzing language of state procurement statutes and payment bond and determining that no interest would be awarded).

It is axiomatic that a person not a party to a contract is not bound by the terms of that contract; this general rule has application in the specific context of determining an appropriate interest rate. See, e.g., Zelda Grain & Supply v. Farmland Indus., 894 P.2d 881, 899 (Kan. Ct. App. 1995) ("A person who is not a party to the contract cannot be bound by the interest rate stated in that agreement." (internal citations omitted)); Monette v. Tinsley, 975 P.2d 361, 363 (N.M. Ct. App. 1999) ("It is commonly held that a . . . surety is not a party bound to the terms of the underlying contract."). The rule clearly applies to disputes between a surety and a supplier seeking to recover under a payment bond. See, Vaughn Excavating & Const., Inc. v. P.S. Cook Co., 981 P.2d 485, 486-87 (Wyo. 1999); SaBell's, Inc. v. City of Golden, 832 P.2d 974, 979 (Colo. Ct. App. 1991).

In Vaughn Excavating, the Wyoming Supreme Court rejected a supplier's claim that the surety should pay interest at the rate provided in the contract between the supplier and the defaulting subcontractor, noting that the general contractor and the surety were not parties to the subcontractor's agreement with the supplier, and as such "had no control over the terms of that agreement." 981 P.2d at 488. Consequently, "'the surety ha[d] consented to be bound

only within the express terms of the surety contract,'" not the supplier's contract with the subcontractor. Id. at 487.

Moreover, the Vaughn court recognized that awarding interest at a contractual, rather than a statutory, rate was inconsistent with the state procurement code's purpose, which was to "to fully compensate [the supplier] for its contribution to the public project," not to provide a means whereby the supplier may "benefit pursuant to its agreement with [the subcontractor]." 981 P.2d at 487. This purpose was "clearly fulfilled when [the material supplier] was paid its quoted price for the goods and materials furnished plus statutory interest." Id. For any additional interest or penalty, "[the material supplier] must look to [the subcontractor] to enforce the terms of their contract." Id.

The logic of Vaughn is applicable to the instant case. The remedial purposes of Utah's payment bond statute would be fully served by an award of prejudgment interest at the lower market rate. The Trial Court, in contrast, awarded QED a windfall by requiring USF&G and Comtrol, parties who were not in privity with QED, to pay the 18% interest rate from the QED-Atlas contract. Affirming the Trial Court's ruling would create a perverse incentive for material suppliers on public jobs to contract with less-than-credit-worthy subcontractors on public works projects at exorbitant interest rates, knowing that when the subcontractor becomes insolvent, the excessive interest will still be available via a bond claim. The 18% interest award is clear legal error, and should be reversed.

B. The Trial Court Erred in Awarding a Punitive Interest Rate that Drastically Differs from the Market Rate of Return.

Utah law allows successful Plaintiffs to collect interest "outside of the contract setting." Whitney v. Faulkner, 95 P.3d 270, 274 (Utah 2004). However, the Utah Supreme Court recently clarified that the Trial Courts of this state should not award prejudgment interest in non-contract situations at punitive rates. See, Wilcox v. Anchor Wate, --P.3d –, 2006 UT 67 (Utah 2006).

In Wilcox, the Trial Court had awarded ten percent statutory interest to the insurance liquidator who brought a preference action against the recipient of a preference payment. In holding that the statutory rate was inappropriate, the Supreme Court first noted that the preference cause of action in favor of the liquidator arose, not out of contract, but as a result of the statutory power granted the liquidator. Id. at ¶ 44. Similarly, QED's claim here arises by statute, not by contract with Appellants.

The Utah Supreme Court then determined that application of the federal bankruptcy preference prejudgment interest rate was appropriate because: (1) a contrary holding would give plaintiffs an incentive to delay prosecution of claims "in order to obtain returns greater than they could have reasonably expected to earn in the market," Id. at ¶ 44; (2) application of the statutory rate could be punitive, Id.; and (3) application of the statutory rate could result in unjust enrichment. Id. at ¶ 44.

The same concerns compel a similar result here. There is no doubt that the 18% prejudgment and postjudgment interest awarded to QED are far in excess of the rate it would have received by investing in the open market. The 18% interest rate is also punitive. Like many preference defendants, USF&G and Comtrol are not guilty of any wrongdoing. It was

Atlas who failed to pay QED the full value of its material supplier agreement, despite the fact that Comtrol had paid Atlas more than the full value of its subcontract. Consequently, the 18% interest award is punitive and unjustly enriches QED. Under the logic of Wilcox, if any interest is to be awarded, it should more closely approximate the market rate of return.

C. The Trial Court Erred in Awarding Postjudgment Interest at a Contractual Rate.

The Trial Court awarded QED 18% post-judgment interest on the principal and the prejudgment interest portion of the judgment. See, Minute Entry of August 31, 2006 (R-). This windfall decision for QED was presumably based on a combination of (1) the idea that the payment bond statute's pronouncement that a bond claimant may sue for "any unpaid amount due him" includes interest; (2) the fact that QED had contracted with Atlas for 18% interest; and (3) the Trial Court's decision that UTAH CODE ANN. § 15-1-4(2)(a), which provides that "...a judgment rendered on a lawful contract shall conform to the contract and shall bear the interest agreed upon by the parties" applied to the judgment in this case. However, because there was no contract between QED and USF&G, this was not a "judment rendered on a lawful contract," and there was no "interest agreed upon by the parties" to apply.

Generally, a surety for a public contract is not liable for a rate of interest included in a contract between a subcontractor and a supplier, instead applying a statutory rate. See, e.g., Keller Supply Co., Inc., v. Lydic Const. Co., 789 P.2d 788, 791 (Wash. Ct. App. 1990); Vaughn Excavating & Const. v. P.S. Cook Co., 981 P.2d 485, 486-87 (Wyo. 1999).

As such, the appropriate postjudgment interest rate is set forth in UTAH CODE ANN. § 15-1-4(3)(a), which provides that non-contract judgments bear interest at the federal postjudgment interest rate on January 1 of the year of the judgment, plus 2%. For 2006, that rate was 6.36%. It was error for the Trial Court to hold otherwise.

D. The Trial Court Erred in Awarding Compound Interest.

The Trial Court's final judgment awarded QED 18 % postjudgment interest on the 18% prejudgment interest portion of the judgment. By definition, QED was awarded compound interest. Compound interest is defined as "interest paid on both the principal and the previously accumulated interest." Black's Law Dictionary 830 (8th rev. ed.2004).

Utah law prohibits compound interest absent the agreement of the parties. See, City of Hildale v. Cooke, 28 P.3d 697, 707 (Utah 2001) ("...[I]nterest on a judgment should be calculated simply unless agreed to otherwise by the parties."); Watkins & Faber v. Whiteley, 592 P.2d 613, 616 (Utah 1979) ("Compound interest is not favored by the law."). There is no agreement between QED and Comtrol or USF&G for compound interest. Accordingly, the Trial Court's award of such was in error and should be reversed.

CONCLUSION

WHEREFORE, Appellants respectfully request that this Appellate Court reverse the Trial Court's Denial of Appellants' Motion to Dismiss Appellee's complaint for Rule 37 discovery violations and remand the case to the Trial Court for an award of Attorneys Fees and Costs to Appellants as the prevailing parties under UTAH CODE ANN. §63-56-504(6). If this Appellate Court affirms the Trial Court's denial of the Rule 37 Motion to Dismiss, then

alternatively, Appellants request that, due to the prejudice caused by QED to Appellants, this Appellate Court reverse the Trial Court's award of Attorneys Fees and Interest at 18% compounded, and instruct the Trial Court to strike the Attorneys Fees and Prejudgment Interest from the Judgment. Finally, if this Appellate Court affirms the Trial Court's award of Attorneys Fee and Interest, then alternatively, Appellants respectfully request that this Court remand the case with instructions to the Trial Court to apply a market pre-judgment interest rate and a post judgment interest rate of 6.36% consistent with UTAH CODE ANN. §15-1-4.

Respectfully submitted this 5th day of April, 2007.

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CALLISTER NEBEKER & McCULLOUGH
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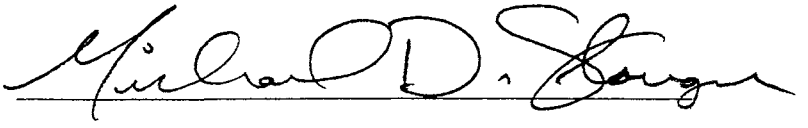
10 East South Temple
Salt Lake City, Utah 84133
Attorneys for Appellants Comtrol, Inc. and United States Fidelity & Guaranty Company

CERTIFICATE OF SERVICE

I HEREWITH CERTIFY that I am a member of and/or employed by the law firm of CALLISTER NEBEKER & McCULLOUGH, Gateway Tower East, Suite 900, 10 East South Temple, Salt Lake City, Utah 84133, and that two (2) true and correct copies of the attached **APPELLANTS' BRIEF** were caused to be served upon the following by depositing properly addressed envelopes containing the same in the U.S. Mails, postage prepaid thereon, this 5th day of April, 2007.

Daniel L. Steele
Robert K. Reynard
Bennett Tueller Johnson & Deere
3165 East Millrock Drive, Suite 500
Salt Lake City, Utah 84121



ADDENDUM

A. "Ledger Statement" (a portion of Plaintiff's Exhibit 9)

B. Invoice QED0025 (Included in Plaintiff's Exhibit 6) and the corresponding Ship Ticket

C. UTAH CODE ANN. § 63-56-504

D. UTAH CODE ANN. § 15-1-1

E. UTAH CODE ANN. § 15-1-4.

F. September 29, 2006 Amended Revised Findings of Fact and Conclusions of Law (R-2124-40)

G. Amended Judgment (R-2141-44)

H. February 27, 2002 Letter (R-647-48)

I. February 12, 2002 Letter (R-649-50)

J. May 15, 2002 Letter (R-651)

Addendum A

A/R Ledger Inquiry: ATLAS ELECTRIC (SLC)/MAGNA JR HIGH Page 1
Printed 11:33am 08/11/2003

Reference#..	Date.....	Customer PO	Debit	Credit	Balance
S1110273.001	06/02/2000	259-01Q	232.50		232.50
S1116074.001	06/14/2000	259-14P	420.00		652.50
S1120797.001	06/23/2000	259-23P	596.75		1,249.25
S1136311.001	07/25/2000	259-28	420.00		1,669.25
S1143383.001	08/07/2000	259-31	218.61		1,887.86
S1153488.001	08/28/2000	259-29		106.80	1,781.06
S1167693.001	09/26/2000	259-38	311.27		2,092.33
S1084377.001	09/28/2000	MAGNA JR HIG	212.76		2,305.09
S1135087.001	09/28/2000	259-01Q	19,949.24		22,254.33
S1135087.003	09/28/2000	259-01Q	15,345.68		37,600.01
S1135087.005	09/28/2000	259-01Q	1,039.68		38,639.69
S1135087.007	09/28/2000	259-01Q	835.52		39,475.21
S1135087.009	09/28/2000	259-01Q	27,763.98		67,239.19
S1135087.011	09/28/2000	259-01Q	1,365.43		68,604.62
S1135087.013	09/28/2000	259-01Q	509.49		69,114.11
S1135087.015	09/28/2000	259-01Q	2,007.68		71,121.79
S1135087.017	09/28/2000	259-01Q	889.26		72,011.05
S1135087.019	09/28/2000	259-01Q	438.46		72,449.51
S1135087.021	09/28/2000	259-01Q	231.58		72,681.09
S1135087.023	09/28/2000	259-01Q	1,048.64		73,729.73
S1171441.001	10/04/2000	259-39	1,061.41		74,791.14
S1171975.001	10/04/2000	259-39	34.13		74,825.27
S1173663.001	10/09/2000	259-41	577.65		75,402.92
S1135087.025	10/11/2000	259-01Q	28,143.30		103,546.22
S1135087.027	10/11/2000	259-01Q	5,127.13		108,673.35
S1135087.029	10/11/2000	259-01Q	40.45		108,713.80
S1178556.001	10/18/2000	259-42	2,402.34		111,116.14
S1184348.001	10/30/2000	259-44	588.35		111,704.49
S1135087.031	10/31/2000	259-01Q	100.13		111,804.62
S1135087.032	10/31/2000	259-01Q	267.73		112,072.35
S1135087.033	10/31/2000	259-01Q	15,295.64		127,367.99
S1189726.001	11/09/2000	259-47	2,277.01		129,645.00
S1189726.002	11/09/2000	259-47	403.84		130,048.84
S1199346.001	12/15/2000	259-02Q	4,131.72		134,180.56
S1199346.003	12/15/2000	259-02Q	599.18		134,779.74
S1199346.005	12/15/2000	259-02Q	3,184.39		137,964.13
S1211545.001	01/02/2001	259-56	916.03		138,880.16
S1199346.007	01/23/2001	259-02Q	180.05		139,060.21
S1199346.009	01/23/2001	259-02Q	73.51		139,133.72
S1199346.011	01/30/2001	259-02Q	4,131.72		143,265.44
S1167533.001	01/31/2001	259-01Q	NC		143,265.44
S1167533.002	01/31/2001	259-01Q	54,649.22		197,914.66
S1135087.035	02/06/2001	259-01Q	353.26		198,267.92
S1135087.037	02/06/2001	259-01Q	6,844.92		205,112.84
S1227828.001	02/06/2001	259-64	61.40		205,174.24
S1199346.013	02/07/2001	259-02Q	269.25		205,443.49
S1228109.001	02/07/2001	259-64	83.21		205,526.70
S1167533.003	02/13/2001	259-01Q	NC		205,526.70
S1199346.015	02/14/2001	259-02Q	9,371.13		214,897.83
S1135087.039	02/23/2001	259-01Q	2.53		214,900.36

Paid # 520,246.66

Not Paid # 143,189.14

TOTAL #663,435.80

OED 0124

PLAINTIFF'S EXHIBIT 9

02090279

Reference#..	Date.....	Customer PO	Debit	Credit	Balance
S1167533.004	02/27/2001	259-01Q	NC		214,900.36
S1199346.017	02/28/2001	259-02Q	11,800.00		226,700.36
S1135087.041	03/12/2001	'	1,315.00		228,015.36
S1243122.001	03/15/2001	259-79	657.10		228,672.46
S1135087.043	03/16/2001	259-01Q	699.81		229,372.27
S1243122.002	03/20/2001	259-79	6.73		229,379.00
S1246440.001	03/20/2001	259-80	1,025.00		230,404.00
S1199346.019	03/23/2001	259-02Q	30,711.67		261,115.67
S1199346.021	03/23/2001	259-02Q	639.06		261,754.73
S1199346.023	03/26/2001	259-02Q	41,603.00		303,357.73
S1248122.001	03/27/2001	259-84	1,898.96		305,256.69
S1199346.025	03/28/2001	259-02Q	10,560.50		315,817.19
S1199346.027	03/28/2001	259-02Q	11,587.45		327,404.64
S1248122.002	03/28/2001	259-84	220.31		327,624.95
S1248283.001	03/28/2001	259-84	165.44		327,790.39
S1167533.005	03/30/2001	259-01Q	NC		327,790.39
S1135087.045	04/03/2001	259-01Q	6,268.95		334,059.34
S1248122.003	04/03/2001	259-84	1,301.73		335,361.07
S1251710.001	04/03/2001	259-88	1,086.06		336,447.13
S1199346.029	04/06/2001	259-02Q	6.46		336,453.59
S1199346.031	04/09/2001	259-02Q	1,246.95		337,700.54
S1199346.033	04/09/2001	259-02Q	141.85		337,842.39
S1248122.004	04/11/2001	259-84	5.41		337,847.80
S1254245.001	04/11/2001	EXTRA/ALAN/M	5.20		337,853.00
S1199346.035	04/13/2001	259-02Q	3,525.98		341,378.98
S1199346.037	04/16/2001	259-02Q	3,659.72		345,038.70
S1199346.039	04/16/2001	259-02Q	315.49		345,354.19
S1259986.001	04/24/2001	MAGNA JR HIG	168.00		345,522.19
S1260637.001	04/26/2001	259-98	1,514.22		347,036.41
S1254245.002	04/27/2001	EXTRA/ALAN/M	125.22		347,161.63
S1199346.041	04/30/2001	259-02Q	7,274.23		354,435.86
S1258125.001	05/01/2001	259-92-SP	1,639.16		356,075.02
S1258125.003	05/08/2001	259-92-SP	16.50		356,091.52
S1266148.001	05/09/2001	259-105	3,236.25		359,327.77
S1266148.002	05/11/2001	259-105	420.00		359,747.77
S1266148.003	05/11/2001	259-105	19.32		359,767.09
S1266148.004	05/11/2001	259-105	403.44		360,170.53
S1266148.005	05/15/2001	259-105	360.00		360,530.53
S1266148.006	05/15/2001	259-105	116.97		360,647.50
S1271729.001	05/22/2001	259-108	184.26		360,831.76
S1271729.002	05/30/2001	259-108	260.32		361,092.08
S1274991.001	05/31/2001	259-110	1,127.50		362,219.58
S1271701.001	06/01/2001	259-108	180.00		362,399.58
S1277567.001	06/06/2001	259-111	1,851.83		364,251.41
S1280319.001	06/12/2001	259-113	1,864.57		366,115.98
S1280601.001	06/12/2001	259-113	77.38		366,193.36
S1280319.002	06/15/2001	259-113	111.54		366,304.90
S1280319.003	06/19/2001	259-113	139.00		366,443.90
S1282817.001	06/19/2001	575-242	80.84		366,524.74
S1282944.001	06/19/2001	259-114	1,979.32		368,504.06

Reference#..	Date.....	Customer PO	Debit	Credit	Balance
S1283007.001	06/19/2001	575-242	14.04		368,518.10
S1280319.005	06/20/2001	259-113	283.56		368,801.66
S1282944.002	06/20/2001	259-114	283.14		369,084.80
S1286181.001	06/26/2001	259-117	456.99		369,541.79
S1286181.002	06/27/2001	259-117	99.32		369,641.11
S1286181.003	06/27/2001	259-117	632.92		370,274.03
S1286679.001	06/27/2001	259-117	670.51		370,944.54
S1289292.001	07/02/2001	259-118	1,047.50		371,992.04
C0250117.001	07/03/2001	ADJUST			371,992.04
S1289476.001	07/03/2001	575-256	248.21		372,240.25
S1289491.001	07/03/2001	259-02Q		4,131.72	368,108.53
S1291145.001	07/10/2001	259-121	2,083.77		370,192.30
S1294142.001	07/16/2001	259-123	2,324.01		372,516.31
S1294220.001	07/16/2001	259-12	272.00		372,788.31
S1294741.001	07/17/2001	259-124	310.51		373,098.82
C0251887.001	07/18/2001	41591		25,687.88	347,410.94
S1295121.001	07/18/2001	259-124	144.08		347,555.02
S1294288.001	07/23/2001	259-123	51.03		347,606.05
S1294288.003	07/24/2001	259-123	204.11		347,810.16
S1261071.001	07/26/2001	259-100SP	900.02		348,710.18
S1301990.001	08/02/2001	MAGNA	818.62		349,528.80
S1301994.001	08/02/2001	575-256	496.43		350,025.23
S1304085.001	08/07/2001	259-132	42.30		350,067.53
S1307222.001	08/15/2001	259-137	2,613.33		352,680.86
S1167533.006	08/20/2001	259-01Q	NC		352,680.86
S1308837.001	08/20/2001	259-139	512.48		353,193.34
S1309366.001	08/20/2001	259-137	33.03		353,226.37
S1309799.001	08/21/2001	259-0140	232.20		353,458.57
S1309824.001	08/22/2001	259-141	207.44		353,666.01
S1135087.047	08/24/2001	'	3,453.87		357,119.88
S1167533.007	08/27/2001	259-01Q	NC		357,119.88
S1311366.001	08/27/2001	259-144	3,794.72		360,914.60
S1311366.002	08/29/2001	259-144	27.80		360,942.40
S1135087.049	08/31/2001	259-01Q	329.04		361,271.44
S1135087.051	08/31/2001	259-01Q	226.16		361,497.60
S1311366.003	09/04/2001	259-144	16.73		361,514.33
S1315701.001	09/04/2001	MAGNA		818.62	360,695.71
S1311366.004	09/05/2001	259-144	230.00		360,925.71
S1199346.043	09/06/2001	259-02Q	1,487.50		362,413.21
S1261071.003	09/11/2001	259-100SP	6,000.00		368,413.21
S1261071.005	09/14/2001	259-100SP	15,096.00		383,509.21
S1261071.007	09/14/2001	259-100SP	15,678.98		399,188.19
S1316524.001	09/14/2001	259-01Q	27.00		399,215.19
S1199346.044	09/17/2001	259-02Q	7,939.96		407,155.15
S1199346.046	09/19/2001	259-02Q	13,740.58		420,895.73
S1322411.001	09/20/2001	259-153	2,080.29		422,976.02
S1322411.002	09/20/2001	259-153	265.80		423,241.82
S1322527.001	09/20/2001	259-153	231.05		423,472.87
S1199346.047	09/21/2001	259-02Q	1,046.96		424,519.83
S1311366.005	09/21/2001	259-144	11.58		424,531.41

Reference#..	Date.....	Customer PO	Debit	Credit	Balance
S1322411.003	09/21/2001	259-153	18.58		424,549.99
S1323363.001	09/21/2001	259-153	1,471.44		426,021.43
S1322671.001	09/24/2001	259-153	714.96		426,736.39
S1323487.001	09/24/2001	259-153		263.19	426,473.20
S1084377.003	09/25/2001	259-09Q	7,629.27		434,102.47
S1199346.049	09/27/2001	259-02Q	3,262.19		437,364.66
S1325763.001	09/27/2001	259-157	908.70		438,273.36
S1325858.001	09/27/2001	259-157	1,519.04		439,792.40
S1325873.001	09/27/2001	259-157	74.37		439,866.77
S1084377.005	09/28/2001	259-09Q	1,863.11		441,729.88
S1327365.001	10/01/2001	259-153		322.65	441,407.23
S1323487.002	10/02/2001	259-153	310.00		441,717.23
S1084377.007	10/05/2001	259-09Q	38,110.57		479,827.80
S1084377.009	10/05/2001	259-09Q	1,822.06		481,649.86
S1199346.051	10/05/2001	259-02Q	7,309.20		488,959.06
S1084377.011	10/09/2001	259-09Q 5,599.72 PD	10,687.08	$5,087.36 NP	499,646.14
S1330677.001	10/09/2001	259-163	1,224.27 NP		500,870.41
S1330677.002	10/19/2001	259-163	404.00 NP		501,274.41
S1084377.013	10/22/2001	259-09Q	18,152.15 NP		519,426.56
S1336742.001	10/24/2001	259 168	2,071.81 NP		521,498.37
S1336742.002	10/24/2001	259 168	149.24 NP		521,647.61
S1336742.003	10/25/2001	259 168	141.25 NP		521,788.86
S1084377.015	10/31/2001	259-09Q	2,052.58 NP		523,841.44
S1333674.001	10/31/2001	259-164	2,731.70 NP		526,573.14
S1339424.001	10/31/2001	MAGNA JR	1,705.11 NP		528,278.25
S1340932.001	11/01/2001	259-KIM	254.52 NP		528,532.77
S1341458.001	11/02/2001	259-173	1,266.11 NP		529,798.88
S1342144.001	11/06/2001	259-174	4,982.09 NP		534,780.97
S1342657.001	11/06/2001	259-175	2,434.18 NP		537,215.15
S1342657.002	11/07/2001	259-175	73.22 NP		537,288.37
S1084377.017	11/13/2001	259-09Q	3,680.95 NP		540,969.32
S1342657.003	11/14/2001	259-175	120.22 NP		541,089.54
S1199346.053	11/15/2001	259-02Q	7,861.38 NP		548,950.92
C0270453.001	11/19/2001	9258		51,123.76	497,827.16
S1322256.001	11/19/2001	259-02Q	1,863.00 NP		499,690.16
S1347379.001	11/19/2001	259-179	1,898.50 NP		501,588.66
S1348298.001	11/20/2001	magna	NC		501,588.66
S1350594.001	11/28/2001	259-184	3,129.50 NP		504,718.16
S1350594.002	11/28/2001	259-184	67.98 NP		504,786.14
S1199346.055	11/29/2001	259-02Q	4,845.84 NP		509,631.98
S1199346.057	11/29/2001	259-02Q	4,039.00 NP		513,670.98
S1352023.001	12/04/2001	259-185	1,548.80 NP		515,219.78
S1353602.001	12/04/2001	259-187	3,731.17 NP		518,950.95
S1353602.002	12/04/2001	259-187	162.07 NP		519,113.02
S1346933.001	12/10/2001	magna jr./ e	773.00 NP		519,886.02
S1346933.004	12/11/2001	magna jr./ e used		773.00	519,113.02
S1346933.006	12/11/2001	magna jr./ e	980.00 NP		520,093.02
S1353602.003	12/11/2001	259-187	186.64 NP		520,279.66
S1346933.007	12/12/2001	magna jr./ e	136.52 NP		520,416.18
S1353602.004	12/12/2001	259-187	196.95 NP		520,613.13

A/R Ledger Inquiry: ATLAS ELECTRIC (SLC)/MAGNA JR HIGH Page 5
Printed 11:33am 08/11/2003

Reference#..	Date.....	Customer PO	Debit		Credit	Balance
S1350594.003	12/13/2001	259-184	272.23	NP		520,885.36
S1353602.005	12/13/2001	259-187	197.42	NP		521,082.78
S1353602.006	12/13/2001	259-187 used			1,177.00 OK	519,905.78
S1357311.001	12/13/2001	259-188	2,231.38	NP		522,137.16
S1357325.001	12/14/2001	259-188	414.09	NP		522,551.25
S1357325.002	12/14/2001	259-188	146.81	NP		522,698.06
S1358922.001	12/18/2001	magna jr	213.26	NP		522,911.32
S1359053.001	12/18/2001	259-188	217.09	NP		523,128.41
S1359254.001	12/18/2001	259-190	1,394.97	NP		524,523.38
S1353602.007	12/21/2001	259-187	30.70	NP		524,554.08
S1361111.001	12/24/2001	259-195	434.00	NP		524,988.08
C0275419.001	12/26/2001	9394			40,297.95	484,690.13
S1361650.001	12/26/2001	259-196	147.01	NP		484,837.14
S1361674.001	12/26/2001	259-196	153.03	NP		484,990.17
S1199346.059	12/27/2001	259-02Q	381.53	NP		485,371.70
S1359388.001	12/27/2001	575	845.00	NP		486,216.70
S1361650.002	12/27/2001	259-196	16.17	NP		486,232.87
S1361702.001	12/27/2001	259-196	1,669.94	NP		487,902.81
S1361735.001	12/27/2001	259-196	136.00	NP		488,038.81
S1361972.001	12/27/2001	259-196	33.30	NP		488,072.11
S1361992.001	12/27/2001	259-188 used			160.32 OK	487,911.79
S1362113.001	12/27/2001	259-196	132.40	NP		488,044.19
S1361111.002	12/31/2001	259-195	1,150.00	NP		489,194.19
S1199346.060	01/02/2002	259-02Q used			[illegible] OK	488,335.81
S1360284.001	01/09/2002	ALAN/EXTRA	332.10	NP		488,667.91
S1360187.001	01/10/2002	259-92-SP-EX	140.40	NP		488,808.31
S1199346.061	02/04/2002	259-02Q	7,104.33	NP		495,912.64
S1261071.009	02/06/2002	259-100SP	575.00	NP		496,487.64
S1199346.063	02/13/2002	259-02Q	46,426.73	NP		542,914.37
C0283000.001	02/15/2002	43170			9,562.25	533,352.12
S1199346.065	02/28/2002	259-02Q	443.14	NP		533,795.26

NP- NOT PAID

Addendum B

QED 0025

** INVOICE **

INVOICE DATE	INVOICE NUMBER
11/29/01	S1199346.057

REMIT TO:
QED DENVER
1661 W 3rd Ave
Denver CO 80223 1435

PAGE NO: 1

BILL TO:
ATLAS ELECTRIC (SALT LAKE)
4300 WEST FARM ROAD (8540 SO)
WEST JORDAN, UT 84088

SHIP TO:
ATLAS ELECTRIC (SLC)/MAGNA JR HIGH
7800 WEST 3600 SOUTH
Magna, UT 84044

CUSTOMER NUMBER	CUSTOMER ORDER NUMBER	RELEASE NUMBER	SALESPERSON	
13957	259-02Q		STEVE HEAPS br5	
WRITER	**SHIP VIA**	**TERMS**	**SHIP DATE**	**ORDER DATE**
HAESHA	BESTWAY FFA	NET 30 DAYS	11/29/01	12/01/00

DESCRIPTION	ORDER QTY	SHIP QTY	NET UNIT PRICE	NET AMOUNT
^LOT BILL - SHAPER LIGHTING	1	1	4039.000	4039.00
This Lot Shipment Consists of: Ship Qty Description -------- ---------- 14 SHAPER 698-INC-120-CBA-GG (GREEN GLASS FRONT PANEL) FIXTURE TYPE "WS1"				
** Reprint ** Reprint ** Reprint **				

2, 98-00cm - ATLAS ELECTRIC (
Manifest Number: M00015458

7:18 am Sign Above Dec 28 2001

Print Name: R Hall

Subtotal	4039.00
S&H CHGS	0.00
0% Tax	0.00
Amount Due	4039.00

Invoice is due by 12/31/01.

All claims for shortage or errors must be made at once returns require written authorization and are subject to handling charges Special orders are non returnable
Past due invoices may be subject to 1.5% late charge

USF Reddaway

CORPORATE OFFICE P.O. BOX 1235 [illegible] FAX NO. (503) 792-3873 TELEPHONE: (503) 850-3700 (PRTL)

LOCAL PHONES
INBOUND (801) 975-9400

DATE 11/15/01 FREIGHT BILL (PRO) NO. 521098727 4

Page 1 of 1 521098727 17 N2

CONSIGNEE	FROM	TO	RATE BASE	OPR	TRAILER NO.	SHIPPER NO.
9900527 51199346	REN	SLC	60640	BLP	GWFT12	NS

ATLAS ELECTRIC/MAGNA JR HIGH
7800 W 3600 S

MAGNA, UT 84044

VL ORIGIN, BEYOND:	SCAC	PRO NO	VL REV	TTL AVR REV

SHIPPER: 0424766 NS
SHAPER LIGHTING
1141 MARINA WAY S
RICHMOND, CA 94804

BILL TO:
SHAPER LIGHTING
1141 MARINA WAY S
RICHMOND, CA 94804

PIECES	HM	DESCRIPTION OF COMMODITIES	WGT (LBS)	RATE	CHARGES
1		SKID LIGHT FIXT 4-8# PCF 109810-2 NOTIFY ON ARRIVAL No Hours Prior- 24 NOA Name-ALAN NOA Phone- 801 428 0402 FUEL SURCHARGE	200		
1		TOTALS FOR PRO - 521098727 4	200	PREPAID	

RECEIVED IN GOOD CONDITION EXCEPT AS NOTED | ARRIVAL TIME | DEPARTED TIME | DATE | PIECES | SHIP INTACT | DRIVER NAME AND NO.

BY X Brian Young | 2:30 | 2:50 | 11-19- | 1 | Y/N NO | Drew M.

PRINTED NAME

DELIVERY RECEIPT IMAGE COPY 1

Shaper order - Pott 51199346 - Inv# 106885

Addendum C

63-56-504. Bonds necessary when contract is awarded -- Waiver -- Action -- Attorneys' fees.

(1) When a construction contract is awarded under this chapter, the contractor to whom the contract is awarded shall deliver the following bonds or security to the state, which shall become binding on the parties upon the execution of the contract:

(a) a performance bond satisfactory to the state that is in an amount equal to 100% of the price specified in the contract and is executed by a surety company authorized to do business in this state or any other form satisfactory to the state; and

(b) a payment bond satisfactory to the state that is in an amount equal to 100% of the price specified in the contract and is executed by a surety company authorized to do business in this state or any other form satisfactory to the state, which is for the protection of each person supplying labor, service, equipment, or material for the performance of the work provided for in the contract.

(2) (a) When a construction contract is awarded under this chapter, the chief procurement officer or the head of the purchasing agency responsible for carrying out a construction project may not require a contractor to whom a contract is awarded to obtain a bond of the types referred to in Subsection (1) from a specific insurance or surety company, producer, agent, or broker.

(b) A person who violates Subsection (2)(a) is guilty of an infraction.

(3) Rules may provide for waiver of the requirement of a bid, performance, or payment bond for circumstances in which the state considers any or all of the bonds to be unnecessary to protect the state.

(4) A person shall have a right of action on a payment bond under this section for any unpaid amount due him if:

(a) he has furnished labor, service, equipment, or material for the work provided for in the contract for which the payment bond is furnished under this section; and

(b) he has not been paid in full within 90 days after the last date on which he performed the labor or service or supplied the equipment or material for which the claim is made.

(5) An action upon a payment bond shall be brought in a court of competent jurisdiction in any county where the construction contract was to be performed and not elsewhere. The action is barred if not commenced within one year after the last day on which the claimant performed the labor or service or supplied the equipment or material on which the claim is based. The obligee named in the bond need not be joined as a party to the action.

(6) In any suit upon a payment bond, the court shall award reasonable attorneys' fees to the prevailing party, which fees shall be taxed as costs in the action.

Renumbered and Amended by Chapter 25, 2005 General Session
Download Code Section Zipped WP 6/7/8 63_29049.ZIP 2,936 Bytes

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Last revised: Monday, December 18, 2006

Addendum D

15-1-1. Interest rates -- Contracted rate -- Legal rate.

(1) The parties to a lawful contract may agree upon any rate of interest for the loan or forbearance of any money, goods, or chose in action that is the subject of their contract.

(2) Unless parties to a lawful contract specify a different rate of interest, the legal rate of interest for the loan or forbearance of any money, goods, or chose in action shall be 10% per annum.

(3) Nothing in this section may be construed in any way to affect any penalty or interest charge that by law applies to delinquent or other taxes or to any contract or obligations made before May 14, 1981.

Amended by Chapter 79, 1989 General Session
Download Code Section Zipped WP 6/7/8 15_01002.ZIP 1,885 Bytes

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Last revised: Monday, December 18, 2006

Addendum E

15-1-4. Interest on judgments.

(1) As used in this section, "federal postjudgment interest rate" means the interest rate established for the federal court system under 28 U.S.C. Sec. 1961, as amended.

(2) (a) Except as provided in Subsection (2)(b), a judgment rendered on a lawful contract shall conform to the contract and shall bear the interest agreed upon by the parties, which shall be specified in the judgment.

(b) A judgment rendered on a deferred deposit loan subject to Title 7, Chapter 23, Check Cashing Registration Act, shall bear interest at the rate imposed under Subsection (3) on an amount not exceeding the sum of:

(i) the total of the principal balance of the deferred deposit loan;

(ii) interest at the rate imposed by the deferred deposit loan agreement for a period not exceeding 12 weeks as provided in Subsection **7-23-105**(4);

(iii) costs;

(iv) attorney fees; and

(v) other amounts allowed by law and ordered by the court.

(3) (a) Except as otherwise provided by law, other civil and criminal judgments of the district court and justice court shall bear interest at the federal postjudgment interest rate as of January 1 of each year, plus 2%.

(b) The postjudgment interest rate in effect at the time of the judgment shall remain the interest rate for the duration of the judgment.

(c) The interest on criminal judgments shall be calculated on the total amount of the judgment.

(d) Interest paid on state revenue shall be deposited in accordance with Section **63A-8-301**.

(e) Interest paid on revenue to a county or municipality shall be paid to the general fund of the county or municipality.

Amended by Chapter 190, 2005 General Session
Download Code Section Zipped WP 6/7/8 15_01004.ZIP 2,587 Bytes

Sections in this Chapter|Chapters in this Title|All Titles|Legislative Home Page

Last revised: Monday, December 18, 2006

Addendum F

Prepared By:
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3865 South Wasatch Blvd., Suite 300
Salt Lake City, Utah 84109
Telephone: (801) 438-2000

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

* * * * * * *

SFR, INC., a Colorado corporation, dba QED, Plaintiff, vs. ATLAS ELECTRIC, INC., a Utah corporation, COMTROL, INC., a Utah corporation, UNITED STATES FIDELITY & GUARANTY COMPANY, a Maryland corporation, and AZAM SOOFI, an individual. Defendants.	**AMENDED REVISED FINDINGS OF FACT AND CONCLUSIONS OF LAW**
COMTROL, INC., a Utah corporation, Counterclaimant and Cross-plaintiff, vs. SFR, INC., dba QED, ATLAS ELECTRIC, INC., a Utah corporation, AZAM SOOFI, an individual, and QES, the exact name of which is unknown. Counterdefendant and Cross-defendants.	Civil No. 020902795 Judge Joseph C. Fratto, Jr.

2124

In a hearing at 3:15 p.m. on Monday, January 23, 2006, the Court issued its findings of fact and conclusions of law relating to the bench trial held from Monday, December 19, 2005 through Thursday, December 22, 2005. Plaintiff SFR, Inc., dba QED and Counterdefendant QES (referred to collectively herein as "QED") were represented at trial and at the hearing by Daniel L. Steele and Robert K. Reynard of Bennett Tueller Johnson & Deere. Defendants Comtrol, Inc. ("Comtrol") and United States Fidelity & Guaranty Company ("USF&G") (collectively "Defendants"), were represented at trial and at the hearing by Cass C. Butler and Michael D. Stanger of Callister Nebeker & McCullough.

FINDINGS OF FACT

Based on the evidence received at trial, the Court makes the following findings of fact, which were either uncontroverted by Defendants or established by substantial evidence (greater than preponderance and less than clear and convincing) produced at trial.

A. Findings Related to the Project, the Payment Bond and the Procedural History of the Litigation.

1. The Board of Education of Granite School District ("Granite") is the owner of the Matheson Junior High School, which is located in Magna, Salt Lake County, Utah (the "Project").

2. Granite awarded a construction contract (the "General Contract") on or about March 8, 2000 under the Utah Procurement Code to Comtrol, the general contractor for the Project.

3. Comtrol obtained a payment bond (the "Bond") from USF&G for the protection of each person supplying labor, service, equipment or material for the performance of the work provided for in the General Contract.

4. Comtrol contracted with Atlas Electric, Inc. ("Atlas"), which agreed to furnish and install certain electrical components for the Project.

5. Azam Soofi ("Soofi") was Atlas' owner.

6. QED contracted with Atlas to furnish electrical materials and supplies for the Project. QED provided bids for gear, fixtures and other major electrical components for the Project.

7. Atlas eventually walked off the Project and failed to complete the work contemplated by the contract between Atlas and Comtrol.

8. Atlas failed to pay QED for all of the materials and supplies QED furnished for the Project. The principal balance of Atlas' unpaid account with QED for the Project is $143,189.14.

9. Atlas ceased conducting business and liquidated its assets and Soofi filed bankruptcy and obtained a discharge of his debts. Accordingly, QED is effectively precluded from collecting from Atlas or Soofi the funds QED is owed with respect to the Project.

10. On April 6, 2000, QED provided the preliminary notices required by Utah Code Ann. § 38-1-27 and § 63-56-38(1) by issuing certified letters to Comtrol, USF&G, Granite School District and Atlas.

11. Defendants failed to offer any evidence at trial to controvert the sufficiency or adequacy of QED's efforts to satisfy the notice requirements of Utah's payment bond statutes.

12. On March 29, 2002, QED filed the Complaint in this action to secure payment for the materials and supplies it furnished for the Project for which it was not paid. QED alleged claims against USF&G (the "Bond Claim") and against Comtrol for Unjust Enrichment.

13. On or about May 28, 2002, Comtrol filed an "Answer, Counterclaim and Cross Claim" against QED and others. Comtrol later amended its Counterclaim. Comtrol stipulated to the dismissal of its Counterclaim with prejudice and upon the merits on the last day of trial after resting its defense. QED and Comtrol stipulated that each would bear its own costs and attorneys' fees with respect to Comtrol's Counterclaim.

14. The Bond guarantees payment for all labor, materials and equipment furnished for use in the performance of the General Contract. Pursuant to the terms of the Bond, Comtrol must indemnify and reimburse USF&G for any payments USF&G may be required to make pursuant to the Bond.

15. Prior to trial, QED stipulated to reduce its claim for the value of various materials and supplies it furnished to Atlas for the Project ("Stipulated Deductions") that are identified in the unpaid invoices comprising Plaintiff's Exhibit A6 (referred to at trial and herein as the "Unpaid Invoices"). The Stipulated Deductions totaled $5,877.65 and reduced QED's actual claim at trial to $137,311.49. The Stipulated Deductions were related to charges for tools, gloves and other charges found in the Unpaid Invoices that were challenged by Defendants.

B. Findings Related to Materials Furnished by QED for the Project.

16. Alan Hall ("Hall") was Atlas' project manager for the Project.

17. Once the construction of the Project began, Hall would call QED to release or order materials and supplies for the Project. Hall would further identify whether the materials should ship to Atlas' warehouse or directly to the Project site in Magna.

18. The process whereby major electrical components or large batches of product were ordered and furnished for the Project by QED and Atlas was complex and detailed. Some products required for the Project were specified on plans and specifications. Other products required for the Project were not specifically identified in the plans and specifications.

19. Per the testimony of Hall, Atlas chose to purchase from QED most if not all of the electrical supplies and equipment required for the Project.

20. QED issued invoices for the materials it furnished for the Project. The Unpaid Invoices (Plaintiffs' Exhibit A6) and the paid invoices, credit memos and statements comprising Plaintiff's Exhibit A7 (referred to at trial and herein as the Paid Invoices and "Credit Memos") are reprinted copies of the original invoices which were generated on or about the time the materials referenced therein were furnished by QED for the Project and are reliable and accurate reproductions of the invoices sent to Atlas during the pendency of Atlas' work on the Project.

21. Depending on the nature of the materials or supplies and Atlas' wishes, QED facilitated delivery of the materials directly to Atlas' warehouse or to the Project. Some materials were shipped directly by QED's vendors or the manufacturers to Atlas' warehouse or to

the Project as requested by Atlas. Also, Atlas picked-up electrical supplies for the Project from QED's Salt Lake warehouse.

22. On Atlas' behalf, Hall reviewed and approved for payment all of the Unpaid Invoices. Furthermore, QED submitted substantial and often uncontroverted evidence at trial to demonstrate that the materials identified in the Unpaid Invoices were not only furnished for the Project but were actually incorporated into the Project.

23. Specifically, the substantial and at times uncontroverted evidence at trial showed that the electrical equipment identified in the Unpaid Invoices, including Colortran system components, NeoRay lights and McPhilben lights were actually installed and incorporated into the Project and furnished by QED at Atlas' request.

24. The substantial weight of the evidence further demonstrated that the miscellaneous or incidental parts identified in the Unpaid Invoices such as wire nuts, screws, wire, conduit and other related parts were also furnished by QED for the Project, required for the Project and actually incorporated into the Project.

25. The substantial weight of the evidence demonstrates that the materials identified in the Unpaid Invoices (with the exception of the Stipulated Deductions) were required by and furnished for the Project and QED furnished said materials at the request of Atlas.

26. The evidence and testimony show that QED furnished materials and/or equipment for the Project for which they were not paid.

27. QED's bills of material and Unpaid Invoices adequately identify the materials and supplies it furnished and demonstrate that the materials and supplies were required for the Project.

C. Findings Related to Payments and Credits.

28. The Unpaid Invoices, after factoring in all applicable credits and payments by Atlas, total $143,189.14.

29. The Paid Invoices and QED's Ledger and Statement (Plaintiff's Exhibit A9) accurately identify all payments and credits to Atlas' account with QED for the Project.

30. Specifically, the payments and credits identified in Plaintiff's Exhibit A9 are applied to the Paid Invoices and are noted on each Paid Invoice as a "Prior Deposit."

31. Atlas did not pay QED for the Unpaid Invoices.

32. Defendants introduced evidence at trial regarding abnormalities and errors in the Unpaid Invoices, the Paid Invoices, Credit Memos and the Ledger and Statement in an effort to undermine the accuracy of QED's accounting.

33. Furthermore, Defendants submitted evidence regarding QED's failure to produce delivery tickets. Defendants further argued that QED's failure to produce its general ledger of all accounts Atlas had with QED further undermined the credibility of QED's accounting.

34. Defendants also argued that QED's invoices had been altered and manipulated in an effort to shift unpaid amounts from other delinquent Atlas accounts on other projects to the Project in an effort to otherwise wrongfully obtain payment from the Bond. The alleged

alterations identified by Defendants at trial allegedly included erroneous delivery signatures that did not match the dates on the Unpaid Invoices and Paid Invoices.

35. Defendants also argued at trial that QED's failure to submit into evidence remittance documents (which were excluded from evidence by the Court as a discovery sanction due to QED's untimely production of the remittance documents) further undermined QED's accounting of the amount it was owed for the Project.

36. However, the Court is not persuaded by Defendants' arguments regarding the nature and quality of QED's evidence and QED's efforts to prove the amount of its Bond Claim.

37. Specifically, the Court finds that the substantial weight of the evidence supported QED's accounting. In fact, the Court is confident QED did not engage in any effort to deceive or misrepresent any material fact regarding the electrical materials it furnished for the Project or to manipulate or deceive with respect to its accounting and application of payments received with respect to the Project.

38. The Court further "triangulated" the evidence by looking at QED's statements and ledgers, invoices and testimony from QED employees at trial. Based on the substantial weight of these various types of evidence, the Court is confident QED's accounting is accurate and reliable.

39. QED's method of keeping records enabled it to adequately identify the Project for which the materials were being provided.

40. QED's records adequately separated the materials it furnished to Atlas for the Project from other purchases made by Atlas.

41. The agreement and arrangement between QED and Atlas pertaining to the Project involved numerous, repeated occasions for performance by both parties.

42. Both QED and Atlas had knowledge of the nature of the performance, the opportunity to object to the arrangement, and that the construction of the agreement and course of performance were reasonable.

43. Furthermore, Defendants' efforts to cast dispersion on the accuracy of QED's accounting by implying that QED manipulated the McPhilben invoices to increase QED's Bond Claim were not persuasive. To the contrary, the Court finds that QED's efforts with respect to the McPhilben invoices demonstrates the accuracy and integrity of QED's accounting and records because QED caught a billing error and corrected that error in the ordinary course of its business with respect to the Project.

44. The Court further finds that the substantial weight of the evidence did not support Defendants' efforts to undermine QED's accounting by arguing that payments that should have been credited to Atlas' account with QED for the Project were diverted to Atlas' account with QED for the Nellis Air Force Base project. In fact, the Court finds that no credible evidence was submitted that would demonstrate any inappropriate intermingling of accounts, payments or invoices between Atlas' various accounts with QED.

45. In fact, the evidence marshaled by Defendants to undermine the accuracy of QED's accounting, invoices, ledger and statement was either irrelevant or sufficiently explained by the evidence at trial such that the Court has a high level of confidence regarding QED's accounting and the evidence supporting the amount QED is owed. The Court therefore finds that

the weight of the evidence marshaled by QED in support of its claims was substantial and outweighed the evidence marshaled by Defendants to undermine the accuracy of QED's accounting, the Unpaid Invoices, Ledger and Statement.

D. Findings Regarding Joint Checks.

46. Comtrol issued several checks made payable jointly to Atlas and QED (the "Joint Checks").

47. Specifically, Comtrol issued Joint Checks to Atlas and QED on July 3, 2001 (for $25,687.88), October 5, 2001 (for $94,116.55), November 13, 2001 (for $85,383.19), December 19, 2001 (for $40,297.95) and February 6, 2002 (for $9,562.25).

48. It is undisputed that Atlas and Comtrol did not present the October 5, 2001 joint check to QED and that QED did not have the opportunity to receive nor did it actually receive any of the funds from that joint check.

49. Atlas' account with QED for the Project was credited with payments of $25,687.88, $40,297.95 and $9,562.65, said credits matching exactly the amounts of the Joint Checks of July 3, 2001, December 19, 2001 and February 6, 2002, respectively. Defendants efforts to prove that QED attempted to deceive or defraud Comtrol with respect to materials supplied or payments received were unpersuasive. To the contrary, the substantial weight of the evidence demonstrates that Altas' account with QED was credited for the full amount of those Joint Checks.

50. On November 7, 2001, QED's representative signed a "Conditional Release of Labor, Services, Equipment and/or Material" acknowledging that as of November 7, 2001, QED

was at that time still owed $51,123.76 for the materials and supplies QED furnished for the Project through September 30, 2001.

51. Thereafter, Atlas presented the November 13, 2001 joint check to QED in the amount of $85,383.19.

52. In exchange for Atlas' payment of $51,123.76 on or about November 19, 2001, which satisfied all amounts owed to QED for the materials and supplies QED furnished for the Project through September 30, 2001, QED allowed Atlas to retain the balance of $34,259.43 provided by the November 13, 2001 joint check.

53. Under the terms of QED's agreement with Atlas, as of November 19, 2001, Atlas was only past due for the invoices issued through September 30, 2001, which totaled $51,123.76.

54. Notwithstanding QED's belief that Atlas did not yet owe the remaining $34,259.43 of the November 13, 2001 joint check, and that QED, therefore, could not retain that money, in fact, the total of the Unpaid Invoices on Atlas' account for the Project (even after applying the $51,123.76 payment) equaled at least the remaining balance of the November 13, 2001 joint check – $34,259.43.

E. Findings Related to Releases of Claims.

55. Defendants also argued at trial that an Unconditional Release signed by a QED representative on May 4, 2001 contained a representation that as of December 29, 2000 "97%" of the gear for the Project had been paid and received.

56. QED rebutted the testimony at trial that the "97%" representation was a reflection of the status of gear delivery as of May 4, 2001, not December 29, 2000.

57. The substantial weight of the evidence demonstrates the finding that the "97%" representation related in time to the date QED signed the Unconditional Release, which was May 4, 2001.

58. Furthermore, Defendants' reliance on various alleged statements by telephone and statements in various Conditional and Unconditional Releases and written acknowledgments was misplaced and not reasonable in light of the complexity of the Project and the volume of electrical equipment supplied by QED for the Project.

F. Findings Related to Principal Amount Owed QED

59. The Unpaid Invoices total $143,189.14.

60. QED's Stipulated Deductions total $5,877.65.

61. After deducting the Stipulated Deductions and $34,259.43 that QED allowed Atlas to keep relating to the $85,383.19 joint check, the total amount of the Unpaid Invoices for which QED is entitled to recover is $103,052.06.

62. $103,052.06 is exactly 75% or ¾ of the total principal amount QED was seeking to recover at trial ($103,052.06 / $137,311.49 = .75).

G. Findings Related to Interest and Attorneys Fees.

63. QED's credit agreement with Atlas provides that it is entitled to recover interest at the rate of 18% per annum on all unpaid amounts.

64. As of September 13, 2006, interest accrued at the rate of 18% per annum on the unpaid amount of $103,052.06 in the amount of $81,109.03 for a total principal and prejudgment interest amount of $184,161.09.

65. Excluding fees and costs relating to Comtrol's counterclaim, as of July 31, 2006, QED incurred at least $157,689.30 in attorneys' fees in prosecuting its claims against Defendants and further incurred at least $2,694.99 in allowable costs.

66. QED and Defendants stipulated at trial that each side would bear their own costs with respect to Comtrol's Counterclaim.

CONCLUSIONS OF LAW

1. The Granite School District is a political subdivision pursuant to Utah Code Ann. § 14-1-18(1)(a),

2. Utah Code Ann. § 63-56-38(1)(b), which was in effect when QED's payment bond claim accrued, requires a contractor to whom a public construction contract is awarded to deliver a payment bond to the State in an amount of equal to 100% of the price specified in the contract for the protection of each person supplying labor, service, equipment or material for the performance of the work provided in the contract.

3. In issuing the Bond, USF&G bound itself with Comtrol to pay all labor, materials and equipment furnished for use in the performance of the General Contract.

4. QED satisfied the preliminary notice requirements of Utah Code Ann. § 38-1-27 and § 63-56-38(1).

5. QED satisfied the notice requirements of the Bond.

6. QED timely filed its lawsuit to commence an action for recovery against the Bond.

7. Contracts of a compensated surety should be liberally interpreted in the interests of the beneficiaries rather than strictly in favor of the surety. See CECO v. Concrete Specialists, Inc., 772 P.2d 967 (Utah 1989).

8. QED's burden under the payment bond statute is to show only that its materials were "furnished" in connection with the Project and not that the specific materials furnished were actually incorporated into the structure. QED's burden can be established without proof of actual delivery of the materials and supplies. While delivery can be determinative, it is not an absolute requirement or element of QED's burden under the payment bond statute. See City Electric v. Industrial Indemnity Co., 683 P.2d 1053 (Utah 1984).

9. QED satisfied its burden by proving (1) that the materials and supplies for which it was not paid were furnished in connection with the Project, and/or (2) that the materials and supplies were ordered from QED's vendors for the Project.

10. The joint check rule has never been adopted as the law of the State of Utah.

11. Notwithstanding the fact that the joint check rule is not the law in Utah, as a matter of equity and law, it was unreasonable for QED to endorse the $85,383.19 joint check and allow Atlas to retain the joint check in exchange for payment from Atlas in the amount of $51,123.76 because Atlas owed QED at least the full amount of $85,383.19 at the time QED allowed Atlas to retain $34,259.43.

12. As an equitable matter, QED is estopped from collecting the $34,259.43 it allowed Atlas to retain from the $85,383.19 joint check and must bear the cost associated with allowing Atlas to keep $34,259.43 of the $85,383.19 joint check.

13. Because it was unreasonable and inequitable for QED to allow Atlas to retain $34,259.43 of the $85,383.19 joint check, the $137,311.49 principal amount owed QED for materials and supplies furnished to the Project must be reduced by $34,259.43.

14. Therefore, as a matter of law, QED is only entitled to recover the principal amount of $103,052.06.

15. Because the statute provides that "[a] person shall have a right of action on a payment bond under this section for *any* unpaid amount due him," and because interest was part of the bargained-for price of QED's agreement with Atlas, QED is entitled to recover interest at the rate of 18% per annum on the principal amount of $103,052.06 in accordance with QED's agreement with Atlas. See Utah Code Ann. § 63-56-38(4).

16. As of September 13, 2006, the amount of prejudgment interest to which QED is entitled is $81,109.03. Interest will continue to accrue at the rate of 18% on the principal amount until the date the Court enters Judgment in favor of QED. Thereafter, interest will accrue at the rate of 18% on the principal and prejudgment interest portions of the Judgment until the Judgment is satisfied.

17. Being entitled to recover 75% or ¾ of the unpaid amounts owed to it for the materials and supplies it furnished for the Project, QED is the prevailing party in this action.

18. Pursuant to Utah Code Ann. § 63-56-38(6), QED is entitled to an award of attorneys' fees and costs in an amount of $123,251.65 as of July 31, 2006, which represents the total amount of fees and costs after deducting: (a) $37,132.64, representing a 25% or ¼ reduction because QED is only entitled to 75% or ¾ of the principal amount it was seeking at trial, (b) all

fees and costs incurred in defending Comtrol's Counterclaim; and (c) the majority of fees and costs incurred by QED in conjunction with QED's Motion to Amend the Judgment.[1]

19. QED is entitled to postjudgment interest at a rate of 6.37% on the attorneys' fees and costs portions of the overall Judgment until the Judgment is satisfied.

20. The amounts of attorneys' fees and costs incurred by QED in prosecuting its Bond Claim are reasonable and consistent with the rates charged by other practitioners in this legal community.

21. In sum, QED is entitled to a judgment against USF&G on its Bond Claim in the principal amount of $103,052.06, plus, interest in the amount of $81,109.03 through September 13, 2006, attorneys' fees in the amount of at least $120,556.66 and costs in the amount of $2,694.99 through July 31, 2006, for a total judgment amount of $307,412.74, with postjudgment interest accruing at a rate of 18% on the principal and prejudgment interest portions of the Judgment and at a rate of 6.37% on the attorneys' fees and costs portions of the Judgment, and attorneys' fees and costs continuing until paid in full.

22. The amount of QED's Judgment shall be augmented in the amount of reasonable attorneys' fees and costs incurred by QED beginning August 1, 2006 as shall be established by affidavit until the Judgment is satisfied.

---

[1] $123,251 65 is the sum of the original attorneys' fees and costs award of $114,092.90 plus the augmented award amount of $9,158.75. The 25% reduction represents a reduction from QED's original attorneys' fees claim of $148,530.55

23. The amount of QED's Judgment against USF&G shall be further augmented in the amounts of any other ongoing interest, reasonable attorneys' fees and costs expended in collecting said Judgment as shall be established by affidavit.

DATED this 29 day of September, 2006.

BY THE COURT:

Honorable Joseph C. Fratto, Jr.
Third District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that on this ___ day of September, 2006, I caused to be served, via hand delivery, a true and correct copy of the foregoing **AMENDED REVISED FINDINGS OF FACT AND CONCLUSIONS OF LAW** upon the following:

Cass C. Butler
Michael D. Stanger
CALLISTER NEBEKER & McCULLOUGH
Gateway Tower East, Suite 900
10 East South Temple
Salt Lake City, Utah 84133

Addendum G

Prepared by:
Daniel L. Steele (6336)
Robert K. Reynard (9480)
BENNETT TUELLER JOHNSON & DEERE
Attorneys for SFR, Inc., dba QED and QES
3865 South Wasatch Blvd., Suite 300
Salt Lake City, Utah 84109
Telephone: (801) 438-2000

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

* * * * * * *

SFR, INC., a Colorado corporation, dba QED, Plaintiff, vs. ATLAS ELECTRIC, INC., a Utah corporation, COMTROL, INC., a Utah corporation, UNITED STATES FIDELITY & GUARANTY COMPANY, a Maryland corporation, and AZAM SOOFI, an individual. Defendants.	**AMENDED JUDGMENT** Civil No. 020902795 Judge Joseph C. Fratto, Jr.
COMTROL, INC., a Utah corporation, Counterclaimant and Cross-plaintiff, vs. SFR, INC., dba QED, ATLAS ELECTRIC, INC., a Utah corporation, AZAM SOOFI, an individual, and QES, the exact name of which is unknown. Counterdefendant and Cross-defendants.	

* * * * * * *

The above-captioned matter came on for bench trial held from Monday, December 19, 2005 through Thursday, December 22, 2005 before the Honorable Joseph C. Fratto, Jr., District Court Judge for the Third Judicial District Court, Salt Lake County, State of Utah. Plaintiff SFR, Inc., dba QED and Counterdefendant QES (referred to collectively herein as "QED") were represented at trial and at the hearing by Daniel L. Steele and Robert K. Reynard of Bennett Tueller Johnson & Deere. Defendants Comtrol, Inc. ("Comtrol") and United States Fidelity & Guaranty Company ("USF&G") (collectively "Defendants"), were represented at trial and at the hearing by Cass C. Butler and Michael D. Stanger of Callister Nebeker & McCullough. The Court heard testimony, received and reviewed evidence, and heard the arguments of counsel. Based upon the Findings of Fact and Conclusions of Law, the Court Orders, Adjudges and Decrees as follows:

1. Judgment is entered against USF&G.

2. The Court awards Judgment in favor of QED and against USF&G in the principal amount of $103,052.06 on QED's payment bond claim.

3. Through September 13, 2006, interest accrued at the rate of 18% per annum on the unpaid principal amount of $103,052.06, in the amount of $81,109.03. The total amount of principal and prejudgment interest on the principal awarded to QED on its Judgment against USF&G as of September 13, 2006 is $184,161.09.

4. Pursuant to Utah Code Ann. § 63-56-38(6), which was in effect when QED's payment bond claim accrued, the Court awards QED attorneys' fees incurred in prosecuting its payment bond claim against USF&G in the total amount of $120,556.66 as of July 31, 2006.

5. The Court awards QED its allowable costs in the amount of $2,694.99 as of July 31, 2006.

6. The total amount of the Judgment entered in this lawsuit in favor of QED and against USF&G, inclusive of principal, prejudgment interest through September 13, 2006, and attorneys' fees and costs through July 31, 2006 is $307,412.74.

7. This Judgment shall be augmented in the amount of prejudgment interest accruing at the rate of 18% per annum beginning September 13, 2006 until this Judgment is entered by the Court.

8. Postjudgment interest will accrue on the principal and prejudgment interest portions of this Judgment at the rate of 18% per annum until this Judgment is satisfied.

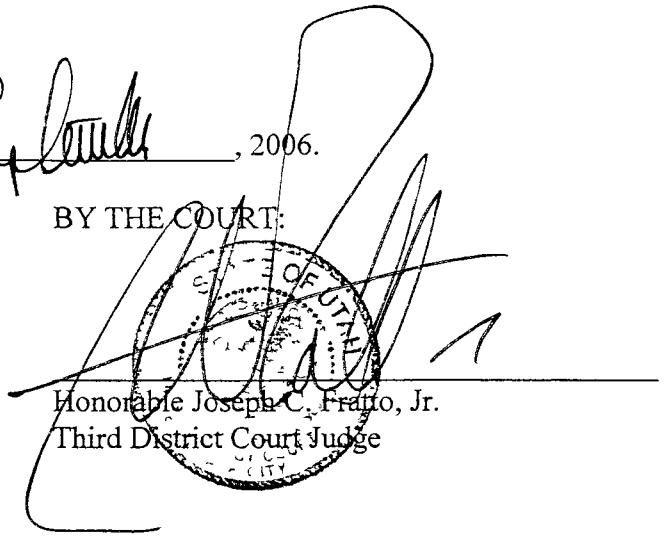
9. Postjudgment interest will accrue on the attorneys' fees and costs portions of this Judgment at the rate of 6.37% per annum until this Judgment is satisfied.

10. This Judgment shall be augmented in the amount of reasonable attorneys' fees and costs incurred by QED beginning August 1, 2006 until this Judgment is satisfied.

11. It is further ordered that this Judgment shall be augmented in the amounts of any other allowable ongoing interest, reasonable postjudgment attorneys' fees and costs expended in collecting said Judgment by execution or otherwise as shall be established by affidavit.

DATED this 29th day of September, 2006.

BY THE COURT:



Honorable Joseph C. Fratto, Jr.
Third District Court Judge

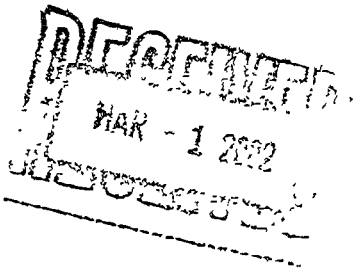
CERTIFICATE OF SERVICE

I hereby certify that on this 12 day of September, 2006, I caused to be served, via hand delivery, a true and correct copy of the foregoing **AMENDED JUDGMENT** upon the following:

Cass C. Butler
Michael D. Stanger
CALLISTER NEBEKER & McCULLOUGH
Gateway Tower East, Suite 900
10 East South Temple
Salt Lake City, Utah 84133

Addendum H

St Paul Surety



United States Fidelity and Guaranty Company
Suite 100
31919 First Avenue South
Federal Way, WA 98003
Telephone:(253) 945-1558

February 27, 2002

Peterson Reed, L.L.C.
Attention Jack. W. Reed
321 Boston Building
9 Exchange Place
Salt Lake City, UT 84111

RE:	Tracking No.:	UA00657
	Principal:	Comtrol, Inc.
	Bond No.:	JX4803
	Claim No.:	0400JX480329S001
	Project:	New Junior High School Project, Salt Lake City
	Claimant:	QED

Dear Mr. Reed:

This letter acknowledges receipt of your correspondence dated February 13, 2002, wherein it is alleged that your client QED is owed $155,975.75 for labor/materials furnished for use on the above-referenced project.

To facilitate our independent investigation of the claim, we request that an authorized representative of QED complete and execute the enclosed Affidavit of Claim. The properly executed affidavit is to be returned to the surety along with copies of all documentation not previously submitted, which fully supports the claim. At a minimum, the documentation should include the following items:

1. Copy of the executed contract, subcontract and/or purchase order or other type of agreement, along with any modifications or approved changes to said agreement;

2. Invoices and signed delivery receipts;

3. A statement of account;

4. Copies of all relevant correspondence, including correspondence between QED and Comtrol, Inc. or others relating to this claim.

5. Copies of all notices, statutory or otherwise, which QED has furnished or served upon any person, agency or entity regarding this claim, including, without limitation, liens, notices of claim, demands or legal proceedings.

6. Any other documentation which will assist the surety with its evaluation of this matter.

Please understand that this listing is not intended to be a complete itemization of all documentation which may be needed by United States Fidelity and Guaranty Company. Various issues may arise during our investigation which may require review of further documentation.

If this matter has been resolved, please notify the undersigned as soon as possible. In the interim, we shall continue our investigation of the claim, which will include contact with our principal to determine its position with regard to your assertions.

This correspondence, our delivery of the Affidavit of Claim and all prior or subsequent communications and/or investigative efforts are made with express reservation of all rights and defenses that may be available to the surety or its principal, whether at law, in equity or under the terms and provisions of the bond and the contract documents. This reservation includes, without limitation, defenses available pursuant to any notice and suit limitation provisions. Subject to this strict and continuing reservation, we look forward to hearing from you soon.

Very truly yours,

United States Fidelity and Guaranty Company

Robert H. Rowan
Sr Claim Attorney Surety
Telephone:(253) 945-1558
bob rowan@stpaul.com

Enclosure

RHR/hs

cc: Comtrol, Inc.
Dale Barton Agency
St Paul Salt Lake

Addendum I

JACK L. SCHOENHALS
ATTORNEY AT LAW
420 EAST SOUTH TEMPLE
SUITE 355
SALT LAKE CITY, UTAH 84111
TELEPHONE: (801) 536-2344
FACSIMILE: (801) 536-0508

February 12, 2002

Peterson Reed LLC
Attn: Jack W. Reed
321 Boston Bldg, 9 Exchange Place
Salt Lake City, Utah 84111

Re: Granite School District New Jr. High
Your Client: QED
Our Client: Comtrol, Inc.

Dear Mr. Reed:

This office represents Comtrol, Inc. Your letter dated February 6, 2002, received by Comtrol on February 11, 2002, has been referred to me for a response.

Comtrol does not have an account with QED., and Comtrol did not order or request any labor or materials to be delivered by QED, to any project and would not be directly responsible for any labor or materials.

If your client has a legitimate claim against Comtrol, Inc., it would have to be as a result of the delivery of materials to a project on which Comtrol is the general contractor. If your client alleges or claims that it delivered materials to a project for which Comtrol, Inc., is the general contractor, please provide the following information:

1. Please identify the project for which you make claim. In addition, please provide a copy of the contract by which your client delivered materials to a subcontractor of Comtrol, Inc.

2. If your client alleges that it delivered materials, please provide a copy of the invoice, the delivery ticket, and any and all information which demonstrates that the materials were incorporated into the project.

3. Please provide an accounting demonstrating that your client has not been paid by the subcontractor for the materials, and please provide proof that demand was made upon the subcontractor, and that the subcontractor either refused, or failed to pay the amount within a reasonable period of time.

4. Comtrol would like to see a copy of any and all communications between your client and the subcontractor for which the materials were delivered, including a line item

statement of charges and payments made to your client regarding the project on which you claim Comtrol, Inc. may have some liability.

Until you provide such information, Comtrol will not be able to respond to your demand.

Enclosed is a copy of the payment and performance bond. If you require a signed copy, that will have to be secured from the owner.

Sincerely Yours,

Jack L. Schoenhals

JLS:jm
Encl.

Addendum J

StPaul Surety

Surety
>1919 First Avenue South, Suite 100
Federal Way, WA 98003
253.945.1540 Tel
253.945.1559 Fax
Mailing address
P.O. Box 4689
Federal Way, WA 98063-4689
www.stpaulsurety.com

May 15, 2002

Peterson Reed, L.L.C.
Attention: Jared Hale
321 Boston Building
9 Exchange Place
Salt Lake City, UT 84111

Principal:	Comtrol, Inc.
Claim No.:	0400JX480329S001
Bond No.:	JX4803
Obligee:	Granite School District
Project:	New Junior High School at 3350 South 7700 West
Claimant:	SFR, Inc., dba QED
Lawsuit:	SFR, Inc., dba QED vs Atlas Electric, Control Inc., United States Fidelity and Guaranty Company and Azam Soofi

Dear Mr. Hale:

This will acknowledge receipt of a Summons and Complaint in an action involving JX4803. Please note that our acknowledgment of receipt of the Summons and Complaint should not be construed as an admission of liability under the bond, nor as waiver of any rights or defenses of United States Fidelity and Guaranty Company or its principal Comtrol, Inc. under the bond or any applicable law.

However, pending the appearance of counsel in the above litigation, we invite you to submit any additional documentation you believe is necessary for United States Fidelity and Guaranty Company to review your client's claim, if you are willing to do so without formal discovery. United States Fidelity and Guaranty Company will review this litigation with Comtrol, Inc. in order to ascertain its position and intentions. After we have done so, we will communicate with you through the attorneys we anticipate appearing to represent United States Fidelity and Guaranty Company in the above litigation.

Yours very truly,

United States Fidelity and Guaranty Company

Robert H. Rowan
Senior Claim Attorney Surety
(253) 945-1558
bob.rowan@stpaul.com

RHR/hs

cc: Comtrol, Inc.
Dale Barton Agency
Comtrol, Inc.

Hale0515.doc

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